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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; JAMES H. GOMEZ, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General, *Petitioner*,

v.

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY A. ASHMUS, of himself as an individual and on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

v.

ARTHUR CALDERON, Warden; TEENA FARMON, Warden of the Central California Women's Facility; JAMES H. GOMEZ, Director, California Department of Corrections; DANIEL E. LUNGREN, Attorney General,
Defendants-Appellants.

No. 96-16141
D.C. No.
CV-96-10533-TEH
OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding
Argued and Submitted
September 18, 1996—San Francisco, California
Submission Vacated June 11, 1997
Resubmitted August 11, 1997

Filed August 18, 1997

Before: Robert R. Beezer and David R. Thompson, Circuit Judges, and Helen Gillmor,* District Judge.

* Honorable Helen Gillmor, District Judge for the District of Hawaii, sitting by designation.

Opinion by Judge Thompson; Dissent by Judge Beezer

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OPINION

THOMPSON, Circuit Judge:

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (Act). Troy A. Ashmus, a state prisoner who has been sentenced to death, brought this action on behalf of himself and others who have been sentenced to death in California. Ashmus contends California may not take advantage of certain benefits provided by Chapter 154 of the Act because California has not yet qualified under the provisions of that Chapter. Chapter 154 of the Act applies to federal habeas corpus proceedings filed by state prisoners under sentence of death. The district court held that California does not qualify under Chapter 154, issued a declaratory judgment to that effect, and preliminarily enjoined California from attempting to invoke any of Chapter 154's benefits. *Ashmus v. Calderon*, 935 F.Supp. 1048 (N.D.Cal. 1996).

We have jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's preliminary injunction. In conducting this review, we first consider whether the

Eleventh Amendment bars this suit. We conclude it does not. We also conclude the district court did not err by issuing its preliminary injunction. We clarify the terms of that injunction, however, to provide that California is enjoined from seeking the benefits provided by Chapter 154 under the current state of California law in cases involving habeas corpus claims of state prisoners under sentence of death.

FACTS

On the day the President signed the Act, Ashmus filed this action in the district court. In his complaint he sought a declaration that California does not qualify under Chapter 154 and that the provisions of Chapter 154 do not apply to the plaintiff class members' habeas corpus proceedings. He also sought injunctive relief prohibiting the State from asserting in any state or federal proceeding that it has qualified under Chapter 154, until the State convinces the district court that it has qualified.

In a thorough opinion, the district court granted Ashmus's request for declaratory relief, entered its declaratory judgment, and issue 1 a preliminary injunction. *Ashmus*, 935 F.Supp. 1048. The district court determined that California, at the present time, does not qualify for Chapter 154's benefits and, as a result, the provisions of Chapter 154 do not apply to the class members' habeas corpus proceedings. The district court enjoined the defendants and their agents "from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 . . . in any state or federal proceeding involving any class member." The district court also certified the class as:

> All prisoners who have been sentenced to death by the State of California and are currently

> awaiting execution pending resolution of their state and federal challenges to their state convictions and sentences, except those such persons whose convictions and sentences were affirmed on direct appeal prior to June 6, 1989.[1]

This appeal followed.

DISCUSSION

A. The Antiterrorism and Effective Death Penalty Act of 1996

The Act amended Chapter 153 of Title 28, which governs federal habeas corpus petitions filed by state prisoners. The Act also added a new Chapter 154, which deals exclusively with habeas corpus petitions filed by state prisoners who have been sentenced to death. Chapter 154 applies only if a state "opts in" and qualifies under either the "post-conviction" or "unitary review" procedures set forth respectively in sections 2261 and 2265 of Chapter 154.

California contends it has qualified under the unitary review procedure. Consistent with this position, the state defendants and their agents have threatened to invoke Chapter 154 in all proceedings involving the plaintiff class members.

Chapter 154 defines a "unitary review" procedure as "a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on

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1. The State conceded that prior to June 1989 it did not provide counsel in a manner which complies with Chapter 154.

collateral attack." 28 U.S.C. § 2265(a). Thus, instead of pursuing a direct appeal of a conviction and a sentence of death and separately pursuing a collateral state habeas corpus proceeding, an appellant/petitioner in California may raise all claims in a single state appeal.

To qualify under the unitary review procedure, a state must appoint counsel to litigate collateral claims, establish standards of competency for the appointment of counsel, and provide reasonable compensation for counsel to investigate and present the collateral claims. 28 U.S.C. § 2265(a), (b). If a state satisfies these requirements and opts into the unitary review procedure, the state is entitled to the benefits of Chapter 154.

As stated by the district court, the Act provides a *quid pro quo* arrangement. In exchange for providing competent counsel and paying reasonable compensation for the investigation and presentation of a condemned prisoner's collateral claims before a state court, Chapter 154 offers expedited review of the federal petition, limitations on a petitioner's ability to amend a federal petition, and restrictions on a federal court's review of the merits of a federal habeas petition.

The expedited review provisions impose limitation periods for the filing and resolution of a federal habeas corpus petition. A petitioner must file a federal habeas corpus petition, subject to limited tolling provisions, "not later than 180 days after final State court affirmance of the conviction and sentence on [unitary review] or the expiration of the time for seeking such review." 28 U.S.C. §§ 2265(c), 2263(a), (b). If the petitioner fails to file a federal petition within this time period, "no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves

the filing of a second or successive application under section 2244(b)." 28 U.S.C. § 2262(c).

Thus, if a petitioner does not file a federal petition within the limitations period, any petition which is filed later is treated as if it were a second or successive petition rather than an initial petition. In the past, we have not addressed the merits of claims in a second or successive petition unless the petitioner demonstrated "cause and prejudice" or "a fundamental miscarriage of justice." *See McCleskey v. Zant*, 499 U.S. 467, 494-95, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Although we do not decide the question, the Act appears to apply a more stringent standard than the standard adopted by McCleskey. *See* 28 U.S.C. § 2244(b)(1), (b)(2), (b)(3)(C).[2]

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2. Under the Act, the district court is directed to dismiss a claim presented in a second or successive petition if that claim "was presented in a prior application." 28 U.S.C. § 2244(b)(1). As a court of appeals, we may issue an order authorizing the filing of a second or successive petition only if the petitioner makes a prima facie showing that the claim was not presented in a prior petition and that the new claim:

> (A) ... relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;
>
> or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(1), (b)(2), (b)(3)(C).

Chapter 154 also attempts to expedite federal habeas review by requiring courts to dispose of habeas petitions within certain time limits. A district court is directed to "render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 180 days after the date on which the application is filed." 28 U.S.C. § 2266(b)(1)(A). A district court may extend this time period, one time, for thirty days, for limited and specified causes, not including a court's congested calendar. 28 U.S.C. § 2266(c)(i), (ii), (iii). Further, the district court is required to give priority to capital habeas petitions "over all noncapital matters." U.S.C. § 2266(a). If the district court does not comply with this time limitation, the state may petition the appellate court for a writ of mandamus and the appellate court must "act on the petition . . . not later than 30 days after the filing of the petition." 28 U.S.C. § 2266(b)(4)(B).

If appealed, the court of appeals must issue a final decision "not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days after the date on which the answering brief is filed." 28 U.S.C. § 2266(c)(1)(A). Further, the court of appeals has only thirty days to decide whether to grant a petition for rehearing or request for rehearing en banc and, if rehearing is granted, must render a final decision "not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered." 28 U.S.C. § 2266(c)(1)(B)(i), (ii). The state may enforce the time limitations governing the appellate courts by applying for a writ of mandamus to the United States Supreme Court. 28 U.S.C. § 2266(c)(4)(B).

We emphasize that in this appeal we express no opinion on the construction or the constitutionality of the Act. Those questions are not before us. The issue we

consider is whether California has qualified under the Act's unitary review procedure so that California may invoke the benefits of Chapter 154. We have highlighted the provisions of Chapter 154 above simply to illustrate the burdens the Act seems to impose on death penalty prisoners and the "benefits" it seems to confer on states who qualify under Chapter 154. Understanding these apparent burdens and benefits is fundamental to the analysis of whether California qualifies under Chapter 154. Before discussing the merits of that question, however, we first examine our jurisdiction.

B. Jurisdiction

We have jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's preliminary injunction. *Bernard v. Air Line Pilots Ass'n*, 873 F.2d 213, 215 (9th Cir.1989).

We do not have jurisdiction under 28 U.S.C. § 1291 to review the district court's declaratory judgment that California does not qualify under Chapter 154 because other claims are still pending before the district court. *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981). A decision is final under Section 1291 only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

In reviewing the injunction pursuant to section 1292(a)(1), however, we may examine matters which are "inextricably bound up" with it. *Marathon Oil Co. v. United States*, 807 F.2d 759, 764 (9th Cir.1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987). In this appeal, whether California complies with Chapter 154 is "inextricably bound up" with the district court's preliminary injunction because the district court's

determination that California does not comply with Chapter 154 is the basis for the injunction. *See MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir.1993), cert. dismissed, 510 U.S. 1033, 114 S.Ct. 671, 126 L.Ed.2d 640 (1994); *Bernard*, 873 F.2d at 215-16.

C. Eleventh Amendment

We next consider California's argument that the district court's declaratory judgment and preliminary injunction violate the State's right to immunity under the Eleventh Amendment. We conclude the present action falls within the Ex Parte Young exception, and the Eleventh Amendment does not bar this suit.

[1] The *Ex Parte Young* exception provides that the Eleventh Amendment generally is not a bar to an action seeking only prospective relief. *See, e.g., Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.1992). California, however, calls our attention to the Fourth Circuit's recent decision in *Booth v. State*, 112 F.3d 139 (4th Cir.1997). In *Booth*, the Fourth Circuit concluded the Eleventh Amendment barred a similar action which challenged whether Maryland had opted in to Chapter 154. *Id.* at 143-44. The Fourth Circuit concluded Maryland's announced intention to invoke Chapter 154 in future habeas corpus proceedings did not threaten to violate and did not violate any federal law. *Id.* at 143. The Fourth Circuit reasoned, "A party bringing suit must always take the possibility of a successful affirmative defense into account in its litigation strategy." *Id.*

[2] We agree that, to fall within the *Ex Parte Young* exception, the plaintiffs in this action must identify a continuing or impending violation of federal law. *See Green v. Mansour*, 474 U.S. 64, 73, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985); *see also Watkins v. Blinzinger*, 789

F.2d 474, 483-84 (7th Cir.1986). The plaintiffs satisfy this requirement. They have demonstrated that California's announced intention to invoke Chapter 154 without having complied with that Chapter's opt-in requirements (as we discuss later in this opinion) threatens to violate their right to federal review of their habeas petitions, pursuant to Chapter 153 of Title 28, and their right to the assistance of counsel, pursuant to 21 U.S.C. § 848(q). Chapter 153 provides for a thorough federal review of a petitioner's first habeas petition. Section 848(q) "grants indigent capital defendants a mandatory right to qualified legal counsel and related services in any federal post conviction proceeding." *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568, 2571, 129 L.Ed.2d 666 (1994) (internal quotations and footnote omitted).

[3] Counsel has not yet been appointed to represent over 130 of the condemned California inmates who make up the plaintiff class. This number no doubt will increase because, according to the district court's estimate, the class will increase by two or three members each month, and it may take years from the date a condemned inmate requests the assistance of counsel until counsel who will take the case is found and appointed. By stating its intention to invoke Chapter 154 once a federal habeas petition is filed, the State is forcing the condemned inmates to make an unacceptable choice between two options, leading to the deprivation of federal review of their petitions. The State's announced intention forces a condemned inmate without counsel to decide whether to immediately file a bare bones habeas petition, with no assurance that the district court later will allow an amendment; or to await the appointment of counsel and, consequently, fail to file a petition within the 180-day period.

[4] Making this choice is not a matter of litigation strategy. It is a matter of life and death. If the condemned prisoner chooses to await the appointment of counsel and not file a bare bones petition within the 180-day period, he runs the risk that his initial petition will be deemed a successive petition subject to restrictive federal review. The downside of choosing this option is so severe there is little likelihood a prisoner will choose it. The risk is simply too great.

If the prisoner chooses the first option and files a bare bones petition within the 180-day time limit of Chapter 154, in all likelihood he will have to do so without the assistance of counsel.[3] In this circumstance, he will have little hope of identifying violations of his federal constitutional rights which may have occurred in state court.

It is no answer to say that a district court might allow the condemned prisoner to amend his bare bones petition. A district court might not allow the amendment. *See* 28 U.S.C. § 2266(b)(3)(B) (prohibiting amendment after answer is filed unless petitioner demonstrates amendment is not an abuse of the writ). Should this happen, the prisoner will be stuck with what most likely will be a losing first petition; and when that petition gets denied any subsequent petition filed with the assistance of counsel will be subject to the restrictive review accorded successive

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3. We recognize that the class includes some condemned inmates who have actually been appointed counsel. As discussed, however, years elapse before counsel is actually appointed. Further, even inmates with counsel may be forced to file a bare bones petition due to the uncertainty as to whether California qualifies under Chapter 154, when California qualified, and when the 180-day period began to run and when the period has or will expire.

petitions. If he loses on his successive petition, he will die.

[5] The State is not entitled to these "benefits" of Chapter 154 unless it complies with the opt-in requirements of that Chapter. Until it does, it remains in noncompliance with the very federal law it seeks to use against the prisoners; and it seeks to use this law to deprive the prisoners of their rights to federal review under Chapter 153 of Title 28. The State's threat to use Chapter 154 in this way also forces the prisoners to file bare bones petitions within the 180-day time limit, before counsel will have been appointed to assist them, thereby depriving them of their right to the assistance of counsel at this critical stage of the habeas process, in violation of 21 U.S.C. § 848(q).

[6] Permitting this action to proceed despite California's Eleventh Amendment immunity defense, as California presents that defense, will have little, if any, impact on the State's sovereign interests. *See Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 4540 (June 23, 1997) (stating court should analyze extent to which an action will affect a State's sovereignty). California is not complaining about being haled into federal court to determine whether it qualifies under Chapter 154. Instead, California argues the appropriate procedure for resolving this dispute is to litigate the issue in each individual federal habeas proceeding, rather than in this single universal action. Whether the issue is resolved in this action or in separate individual habeas proceedings, California acknowledges the issue will be resolved by a federal court into which it will be haled, if not willingly at least resignedly. If there is any impact on California's sovereignty beyond what there would be as a result of separate federal habeas proceedings, the impact is slight. If anything, it is a matter of timing, not of substance.

[7] Finally, efficiency and fairness concerns dictate that this single action is the appropriate method to resolve whether California qualifies under Chapter 154. These concerns affect the determination of whether the *Ex Parte Young* exception applies. *See Coeur d'Alene*, 65 U.S.L.W. at 4543. If the condemned inmates were forced to litigate the opt-in issue in each individual federal habeas proceeding, divergent district court opinions could occur. Resolving the issue in this single universal action will avoid such a consequence.

[8] Deciding the issue here and now also avoids a multiplicity of suits addressing the same issue. As District Judge Motz observed in his opinion when Booth was before the district court, "[r]equiring relitigation of those questions in each habeas case is also inconsistent with the purpose of the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471 et seq., to reduce the cost and delay of civil litigation in the federal courts." *Booth v. State*, 940 F.Supp. 849, 852 n. 3 (D.Md.1996). We also embrace Judge Motz's view that "it is clearly not in the interest of any citizen of the State of [California] to have her state and federal tax dollars wasted by having assistant attorneys general and counsel for capital defendants appointed and compensated under the Criminal Justice Act litigate before multiple judges in successive pieces of litigation issues that can easily be resolved in a consolidated proceeding." *Id.*

[9] We conclude that the Eleventh Amendment does not bar this action.

D. Merits

We will uphold a district court's grant of a preliminary injunction unless the district court "incorrectly applied the law, relied on clearly erroneous factual findings, or otherwise abused its discretion." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996). "Although district courts have wide discretion in issuing preliminary injunctions, 'where the district court is alleged to have relied on erroneous legal premises, review is plenary.'" *Id.* (quoting *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 455 (9th Cir.1994)).

1. Declaratory Judgment

In his complaint, Ashmus asserted a "claim" or "cause of action" under the federal Declaratory Judgment Act, 28 U.S.C. § 2201, and under 42 U.S.C. § 1983. The district court issued its preliminary injunction as "necessary and proper to effectuate the terms of its declaratory judgment." The State argues that the injunction is ancillary to the declaratory judgment, and is improper because Ashmus's request for declaratory relief is not a separate claim but is merely a remedy for his section 1983 claim. Thus, according to the State, the district court could issue the injunction only if Ashmus made a sufficient showing on the merits of his section 1983 claim. We reject this argument and conclude we need not address California's arguments relating to the merits of Ashmus's section 1983 claim.

First, a district court may issue an injunction as ancillary to a declaratory judgment. *See* 28 U.S.C. § 2202 (permitting court to issue "[f]urther necessary or proper relief based on a declaratory judgment"); *Doe v. Gallinot*, 657 F.2d 1017, 1024-25 (9th Cir. 1981) (concluding district court did not err in issuing injunction under section 2202).

Further, a request for a declaratory judgment does not require an independent underlying claim. The Declaratory Judgment Act permits the adjudication of rights before a claim for damages or injunctive relief arises. *Societe de Conditionnement v. Hunter Eng'g Co.*, 655 F.2d 938, 942-43 (9th Cir. 1981). "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Id.* at 943.

[10] The key inquiry is whether the invocation of judicial authority to render a declaratory judgment is justified. *Cf.* Edward Borchard, Declaratory Judgments 18, 26 (2d ed.1941). To assert a claim for declaratory relief, a plaintiff need only demonstrate an independent basis of federal jurisdiction and an actual case or controversy. *Cf.* Schwarzer, Tashima, & Wagstaffe, Federal Civil Procedure P 10.6 (1996); *see also Eureka Fed. Sav. & Loan v. American Casualty Co.*, 873 F.2d 229, 231 (9th Cir.1989) (defining actual case or controversy and setting forth guiding principles to determine if declaration appropriate). If the court has subject matter jurisdiction of an actual case or controversy, a party who satisfies the requirements for a declaratory judgment action need not wait until a separate underlying claim arises.

[11] The district court had federal question jurisdiction under 28 U.S.C. § 1331: the interpretation and application of a federal statute, the Act. *See Guinasso v. Pacific First Fed. Sav. & Loan*, 656 F.2d 1364, 1365-66 (9th Cir.1981), cert. denied, 455 U.S. 1020, 102 S.Ct. 1716, 72 L.Ed.2d 138 (1982).

[12] Ashmus also sufficiently demonstrated that his action involves an actual case or controversy. He established that the State's threats to invoke Chapter 154 will significantly affect the plaintiff-class's ability to obtain habeas corpus review by a federal court. He

demonstrated that the class members may be forced to immediately file bare-bones petitions to comply with the six-month filing deadline under Chapter 154. There is no guarantee that, after filing such a bare bones petition, a district court will allow its amendment. *See* 28 U.S.C. § 2266(b)(3)(B). By having to file an immediate federal habeas petition, class members may waive or fail to sufficiently develop meritorious claims.

[13] Because the plaintiff-class demonstrated that federal jurisdiction and an actual controversy exist and no prudential concerns warrant declining relief, *see McNabb v. Bowen*, 829 F.2d 787, 794 (9th Cir. 1987), the district court had the authority to issue a declaratory judgment.

2. Does California Qualify Under Chapter 154

As noted above, under the unitary review procedure, to qualify for the benefits provided by Chapter 154, California must:

> establish[ ] *by rule of its court of last resort* or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.
>
> . . .
>
> [and] must include an offer of counsel following trial for the purpose of representation on unitary review

> . . . .

28 U.S.C. § 2265(a),(b) (emphasis added).

California argues that the following, in combination, constitute a "rule of its court of last resort" which set forth standards of competency and compensation: (1) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" (Rules of Court); (2) Rules of Court 76.5; (3) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council; (4) the California Supreme Court's Statement of Internal Operating Practices and Procedures; (5) the California Supreme Court's Statement of Policies Regarding Cases Arising from Judgments of Death; (6) *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (Cal.1993); and (7) California Government Code Section 68511.5.

[14] Of these sources, the only competency standards are set forth in section 20 of the Standards recommended by California's Judicial Council. Section 20 provides:

> The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

[15] The district court determined that California does not qualify under Chapter 154 because (1) the competency standards are not set forth in a "rule of court of last resort;" (2) even if section 20 constituted a "rule of court of last resort," section 20 does not impose binding or mandatory competency standards and does not set forth any requirement that counsel have any expertise in investigating and presenting collateral habeas claims; (3) California does not provide an adequate mechanism for compensating counsel for the investigation and presentation of collateral habeas claims; and (4) California has not made a bona fide offer of counsel because, although counsel has been offered to members of the plaintiff class, counsel has not been timely appointed or actually appointed for approximately a quarter of the class members. We agree with these determinations.

The district court correctly determined that section 20 is a recommendation but is not a "rule of court." California's Judicial Council has the power to "make recommendations to the courts" and to "adopt rules for court administration." Cal. Const. Art. VI, § 6. The Introductory Statement to the California Rules of Court states that the use of the term "should" indicates a particular section is a nonbinding recommendation. Cal. Rules of Court-State at 1 (1996). Section 20 consistently uses the term "should" rather than "shall." Clearly, therefore, section 20 is a recommendation, not a rule.

But, even if section 20 were a "rule of court," the nonbinding nature of the competency standards does not satisfy Chapter 154. It is clear that, in exchange for restrictions imposed on federal habeas review, Congress intended states to provide competent counsel. A state does not qualify under Chapter 154 by setting forth competency standards that the state can completely

disregard when appointing counsel. Further, California has presented no evidence indicating that the State actually follows the relied-upon standards when appointing counsel for condemned prisoners.[4]

The district court also determined that section 20 is inadequate under Chapter 154 because the section does not require appointed counsel to have any familiarity with habeas corpus litigation. We recognize that habeas corpus law is complex and has many procedural pitfalls. We, however, are reluctant to require appointed counsel to have familiarity with or experience in habeas corpus law. Many lawyers who could competently represent a condemned prisoner would not qualify under such a standard. We conclude a state's competency standards need not require previous experience in habeas corpus litigation.

California also fails to comply with Chapter 154 because it does not provide compensation for counsel to adequately investigate and present collateral claims. The California Supreme Court limits compensation to collateral claims that are discoverable by reference to the four corners of the appellate record. *Clark*, 21 Cal.Rptr.2d 509, 855 P.2d at 751-52, 751 n. 19. This is not sufficient to comply with Chapter 154. Although states need not compensate counsel for a fishing expedition, competent counsel must be permitted some latitude in investigating claims that are not revealed by the record. It must be kept in mind that if a claim is not presented in an initial federal habeas petition, the petitioner runs the risk of waiving the claim even if it is meritorious. *See*

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4. We do not mean to imply that California actually must adopt the standards set forth in section 20. California simply must set forth adequate, mandatory standards in a rule of its court of last resort or by statute. 28 U.S.C. § 2265(a).

Brown v. Vasquez, 952 F.2d 1164, 1166-67 (9th Cir.), cert. denied, 503 U.S. 1011, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992). Meritorious habeas claims may exist outside of the record. Indeed, ineffective assistance of counsel claims typically fall within this category.

Finally, the district court correctly determined that California's failure to actually appoint counsel after an indigent prisoner has said he or she will accept counsel precludes California from qualifying under Chapter 154. Chapter 154 requires a state to enter an order appointing counsel "upon a finding that the prisoner is indigent and accepted the offer [of counsel] or is unable competently to decide whether to accept or reject the offer . . . ." 28 U.S.C. § 2261(c)(1), 2265(b). The plaintiff class presented evidence that counsel often is not appointed until years after a prisoner accepts the offer of counsel. California may not take advantage of the six-month limitations period when it takes years to appoint counsel.

[16] In sum, we hold that California does not qualify at this time for the benefits of Chapter 154. This holding does not preclude California from adopting policies to qualify under Chapter 154. We conclude only that, to take advantage of the benefits under Chapter 154, California must fulfill its part of the bargain by timely appointing and compensating competent counsel to assist a condemned prisoner in his or her unitary review proceedings.

[17] Nor did the district court err in determining that an injunction was necessary to effectuate its declaratory judgment. Had the district court not issued the injunction, California would have been free to assert in other federal and state proceedings the same position it asserts in this case.

[18] We clarify the injunction, however, to provide that California is enjoined from asserting in any state or federal court that it qualifies for the benefits of Chapter 154 under the current state of California law in cases involving habeas corpus claims of state prisoners under sentence of death. Moreover, the district court may determine, depending upon future events, to modify its injunction as may be appropriate.

E. First Amendment

California also contends the injunction violates the First Amendment. We disagree. The injunction does not interfere with the state officials' free speech rights. They are free to voice their opinion that the district court, and we, are wrong. The officials, however, may not seek to invoke the opt-in benefits of Chapter 154 in litigation arising under the current state of California law in cases similar to the present case after the district court and this court have determined that the State has not complied with Chapter 154's opt-in requirements.

F. Attorney Fees

The plaintiff class requests attorney fees on appeal, asserting they are "prevailing parties" under 42 U.S.C. § 1988. To be eligible for an award under section 1988, a party "must prevail on at least some aspect of the merits of his civil rights claim." *Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir.1988); *see also Jensen v. City of San Jose*, 806 F.2d 899, 900-01 (9th Cir. 1986). In this appeal we do not address any aspect of the class's section 1983 civil rights claim. Accordingly, we decline to award any attorney fees.

CONCLUSION

The district court, in a thorough and well-reasoned opinion issued under severe time constraints, correctly determined that California does not presently qualify under Chapter 154, and properly issued its declaratory judgment. We affirm the district court's preliminary injunction, as clarified by this opinion. The district court retains the power to modify the injunction depending upon future events.

AFFIRMED.

BEEZER, *Circuit Judge*, dissenting:

Among the defenses pleaded in the district court by Calderon, as warden, and his co-defendants is the "seventh defense," which asserts: "Defendants allege that the relief sought in the complaint is barred by the Eleventh Amendment to the United States Constitution."

No court is free to address the merits of a cause until it is satisfied that it has jurisdiction over the subject matter of the case and the parties to the litigation. The district court here claimed jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the Constitution, laws or treaties of the United States) and under 28 U.S.C. § 1343(a)(3) (action under 42 U.S.C. § 1983). The district court did not claim to exercise habeas corpus jurisdiction under 28 U.S.C. § 2254.

In lengthy findings of fact, conclusions of law and order filed June 14, 1996, the district court does not address the defendants' seventh defense. I will.

The complaint alleges that this action is brought against defendants in their official capacity. Be the action

against a prison warden, the Director of the Department of Corrections or the Attorney General of California, these officers act in their official capacity and in furtherance of sovereign powers of the State of California. Each official claims Eleventh Amendment immunity.

The court's opinion filed today (Discussion, part C) tells us that the immunity defense will not lie because the prisoners' class action claims fall within the *Ex Parte Young* exception. The exception, we are told, arises from the fact that the prisoners have identified "a continuing or impending violation of federal law."

The Fourth Circuit in *Booth v. State of Maryland*, 112 F.3d 139 (4th Cir. 1997), considered a prisoner complaint which made claims that the prisoners mimic here. I am persuaded by the opinion in *Booth* that the prisoners here have wholly failed to defeat California's immunity defense. After engaging in an exacting analysis, the *Booth* court concluded:

> In sum, this action fails to satisfy the requirements of *Ex Parte Young*. Neither the invocation of a chapter 154 defense, nor the announced intention to assert such a defense, nor the failure to comply with chapter 154 constitutes a continuing violation of federal law. Under these circumstances, we find no authorization in *Ex Parte Young* for abrogating Maryland's Eleventh Amendment immunity. Since injunctive relief is not available in this case under *Ex Parte Young*, declaratory relief is not available either. *Green*, 474 U.S. at 74. *Id.* at 144.

I would direct the district court to quash its preliminary injunction, vacate its order of June 14, 1996

and dismiss the plaintiffs' complaint. This would grant the state officials the Eleventh Amendment immunity to which they are entitled. I would avoid the inter-circuit conflict of decision in a matter of national concern that is created by the rejection of the *Booth* holding in our court's opinion filed today.

FILED
JUNE 14, 1996
RICHARD WEIKING
CLERK
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

TROY A. ASHMUS, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. C 96-1533 TEH
v.	)	
	)	
ARTHUR CALDERON,	)	FINDINGS OF FACT,
et al.,	)	CONCLUSIONS OF
	)	LAW AND ORDER
Defendants.	)	
	)	

INTRODUCTION

This case concerns the applicability of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("Act"), Pub.L. 104-132, 110 Stat. 1214, to the State of California. Plaintiffs[1] contend that California has failed to comply with the Act's so-called "opt-in" provisions, as set forth in the newly created Chapter 154 of the Judicial Code. Accordingly, plaintiffs contend, the expedited review and other provisions of Chapter 154 do not, and

1. Troy A. Ashmus is the only named plaintiff in this action. Because the Court has already provisionally certified the class, however, and for convenience sake, the Court will use the plural form, plaintiffs, unless referring specifically to Mr. Ashmus.

cannot, apply to petitions brought under 28 U.S.C. § 2254 by prisoners challenging California judgments of death.

On May 24, 1996, the Court issued a short order granting plaintiffs' request for provisional class certification, declaratory relief, preliminary injunctive relief, and to proceed in forma pauperis. The Court also granted defendants' request for a temporary stay of the preliminary injunction and denied defendants' expedited motion to dismiss. In accordance with Fed.R.Civ.P. 65 and the dictates of Fed.R.Civ.P. 52(a), this memorandum opinion and order sets forth the findings of fact and conclusions of law that constitute the grounds for the Court's May 24 order.

Good cause appearing, and for the reasons discussed below, the Court also hereby GRANTS defendants' request for a partial five (5) day stay of this order, and MODIFIES its provisional certification of the class to exclude the approximately 50 death row inmates in California whose sentences were affirmed on direct appeal prior to June 6, 1989.

FINDINGS OF FACT

1. The Parties

Plaintiff Ashmus is a prisoner who has been sentenced to death by the State of California. The California Supreme Court affirmed his conviction and sentence on December 5, 1991. *People v. Ashmus*, 54 Cal.3d 932, 2 Cal.Rptr.2d 112, 820 P.2d 214 (1991), rehearing denied, Jan. 29, 1992, cert. denied, 506 U.S. 841, 113 S.Ct. 124, 121 L.Ed.2d 79 (1992). On February 17, 1993, plaintiff instituted federal habeas proceedings challenging his conviction and death sentence by filing an Application for Appointment of Counsel and a Request

for Stay of Execution in *Ashmus v. Calderon*, No. 93-0594-TEH (N.D.Cal.). *See* Special Requirements for Capital Habeas Corpus Petitions, Local Rule 296-8(b) (condemned prisoner's pro se application for appointment of counsel and for temporary stay of execution "shall be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition upon appointment of counsel"); *see also McFarland v. Scott*, 512 U.S. 849, ___ U.S. ___, 114 S.Ct. 2568, 2572-73, 129 L.Ed.2d 666 (1994) (concluding that a "'post-conviction proceeding' within the meaning of [21 U.S.C.] § 848(q)(4)(B) is commenced by the filing of a death row defendant's motion requesting appointment of counsel for his federal habeas corpus proceeding").

Plaintiff, whose current counsel was appointed in August 1995, had anticipated filing his "finalized petition" for writ of habeas corpus by August 2, 1996.[2] Magistrate Judge Joan Brennan recently vacated this "presumptive" filing date, however, and no date is currently set for the filing of his petition. *Ashmus v. Calderon*, No. 93-0594-TEH (JB) (N.D.Cal. May 24, 1996).

As of April 1, 1996, each of the 438 other members of the proposed plaintiff class had also been convicted and sentenced to death by the State of California, and was awaiting execution. More than a quarter of the proposed class members are without counsel and likely to remain so for some time. By defendants' own admission, "Every inmate who is awaiting appointment of counsel has been 'offered' counsel and that offer has been accepted; what is pending is the appointment itself." Defs.' 1st Opp'n Mem. at 16 (emphasis in original); *see also* Pls.' Ex. 5 at

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2. "'Finalized petition' [] refer[s] to the petition filed by retained or appointed counsel." Local Rule 296-5.

A1, Mack Reed, *An Even Longer Wait on Death Row*, L.A. Times, April 3, 1996, at A1, A14 (noting that 128 men and six women on death row are waiting for counsel). Approximately 145 of the proposed class members currently have pending federal habeas proceedings. On average, two to three individuals are added to the proposed class each month.

The four defendants are Arthur Calderon, Warden of San Quentin Prison and the custodian of all male persons sentenced to death and housed at that facility; Teena Farmon, Warden of the Central California Women's Facility, and custodian of all female persons sentenced to death and housed at that facility; James Gomez, Director of the California Department of Corrections; and Daniel Lungren, California Attorney General. Plaintiffs have sued each defendant in his or her official capacity and have alleged that each defendant acts under color of law.

2. The Statute

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. Title I of the Act, entitled "Habeas Corpus Reform," modifies existing habeas corpus procedures contained in Chapter 153 of the Judicial Code (Title 28), and enacts a new Chapter 154, adding §§ 2261-2266 to Title 28.[3] [FN3] Chapter 154 offers a system of expedited review and other "benefits"[4]

3. Unless otherwise indicated, all further statutory references are to Title 28.

4. The benefits to opt-in states include a six-month statute of limitations on the filing of federal habeas corpus petitions, limitations on amendments to petitions and their factual development, and limitations on federal courts' power to review the merits of constitutional claims and order appropriate relief. 28 U.S. §§ 2263-2264. Moreover, for qualifying states, capital habeas matters must be reviewed under strict, statutorily prescribed time limits, and must be "given priority by the district court and by the court of appeals over all noncapital matters." § 2266(a).

to states that qualify under either of two so-called "opt in" procedures: (1) the "post- conviction" procedure provided for in § 2261 or (2) the "unitary review" procedure provided for in § 2265.

The Act, which largely codified a 1989 proposal by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases,[5] essentially establishes a "quid pro quo arrangement under which states are accorded stronger finality rules on federal habeas review in return for strengthening the right to counsel for indigent capital defendants." House Report at 10 (emphasis added). The Act thus seeks to create an incentive for states to provide competent counsel throughout state collateral review, recognizing that such counsel is "crucial to ensuring fairness and protecting the constitutional rights of capital litigants." Powell Committee Report at 3240; *see also* House Report at 8; 137 Cong.Rec. at S3220 & S3222 (March 13, 1991) (Section-by-Section Analysis of the Comprehensive Violent Crime Control Act of 1991)

5. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 Crim.L.Rep. (BNA) 3239 (Sept. 27, 1989) ("Powell Committee Report"); *see also* House Comm. on the Judiciary, Effective Death Penalty Act of 1995, H.R.Rep. No. 23, 104th Cong., 1st Sess., at 16 ("House Report") ("Proposed 28 U.S.C. 2256 [codified as § 2261] sets out the basic conditions for states to 'opt in' to the Powell Committee procedures, by extending appointment of counsel for indigent capital defendants to state collateral proceedings."). Although the House issued this report in connection with the proposed 1995 Act, the relevant portions of the proposed 1995 Act are identical to the legislation signed into law.

[hereinafter "1991 Analysis"].[6] In exchange for adequately providing such competent counsel, Congress offered states a potentially available mechanism for ensuring expedited and final review of federal habeas corpus petitions. 1991 Analysis, 137 Cong.Rec. at S3220 & S3222; House Report at 8 & 10; Powell Committee Report at 3239.

3. The Harm Caused by Defendants' Conduct

In public statements both prior to and since enactment of Title I, throughout this litigation, and in other cases pending before federal courts in California, defendants and their agents have consistently and vigorously maintained that California qualifies for Chapter 154's benefits under § 2265's unitary review procedure. Defendants claim that California satisfies § 2265 by virtue of a "comprehensive scheme of interlocking, cross-implementive provisions." The qualifying mechanism, defendants claim, became effective on June 6, 1989, and consists primarily of the following: (1) Cal.Gov't Code § 68511.5 (effective Jan. 1, 1984), (2) Rule 39.5 of the "Rules of Practice and Procedure Adopted by the Judicial Council and the Supreme Court" ("Rules of Court") (effective Jan. 1, 1983), (3) Rule of Court 76.5 (effective Jan. 1, 1985), (4) Section 20 of the Standards of Judicial Administration Recommended by the Judicial Council (effective Jan. 1, 1985), (5) the California Supreme Court Statement of Internal Operating Practices and Procedures ("IOPP") (Adopted Summer 1985, Revised December 1989, and in 1995), (6) the California Supreme Court Statement of Policies Regarding Cases Arising From Judgements of Death (the "June 6, 1989 Policies")

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6. The relevant provisions of the 1991 Act are also identical to the legislation signed into law.

(adopted June 6, 1989), and (7) *In re Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993). Accordingly, defendants have threatened to invoke chapter 154 in all federal court proceedings involving members of the proposed class.

Absent judicial relief from this Court, defendants' threats to invoke Chapter 154's expedited review provisions will effectively cause plaintiffs to forfeit rights to which they are entitled under Chapter 153. As the Court has previously noted,

> Without a judicial determination of the rights and responsibilities of the parties to this action, prisoners under sentence of death by the State of California must necessarily guess as to whether and how Chapter 154 may constrain their ability to seek redress in the federal courts for deprivations of their constitutional rights. The absence of a clear and uniformly applicable determination that the State of California has or has not complied with the provisions of Chapter 154 forces all condemned prisoners to choose between the risk of unknowingly relinquishing their entitlement to federal habeas corpus procedures under Chapter 153, or the risk of unknowingly forfeiting any enforcement of their federal constitutional rights.
> ¶.
> California's eligibility to proceed under Chapter 154 literally may have life or death consequences for plaintiff and members of the proposed class
> . . .

Ashmus v. Calderon, No. C96-1533 TEH at 4-5 (N.D.Cal. May 24, 1996).

Plaintiffs will be forced to forfeit their rights under Chapter 153 as a direct result of the uncertainty over Chapter 154's applicability created by defendants' assertions. Defendants' statements during the course of this litigation leave little room for doubt that, absent judicial relief, they will continue to make such threats and assertions.

As a practical matter, defendants' assertions would thus secure for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that states are required by Congress to give plaintiffs as a quid pro quo for receiving such benefits. For these reasons, defendants' threats effectively deprive plaintiffs of their rights under chapter 153, and, arguably, under the Due Process Clause as well.[7]

As the Supreme Court recently observed, erroneously denying a state prisoner use of a first "federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human

7. Defendants' make the unrealistic and infeasible suggestion that plaintiffs can readily avoid any harm by acting as if Chapter 154 does apply in California, and then, if a Court subsequently determines that Chapter 154 does not apply, withdrawing any hastily filed petition and refiling it at a later date. Under such a scenario, plaintiffs' counsel will have to file and then refile piecemeal claims. Counsel will have to start and stop investigation and funding. Counsel will have no idea what time constraints exist with respect to discovery or how to plan a coherent investigation. Counsel will have no idea, in seeking discovery and fashioning an investigation plan, what rules and standards apply to the evidentiary hearing or on what bases relief may be granted. In the Court's view and experience, it is wholly unrealistic and, indeed, unworkable, for counsel to proceed effectively in such a fashion.

liberty." *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1299, (1996) (reversing the Eleventh Circuit's order vacating the lower court's stay of a state execution). Effectively forcing state prisoners to file hasty habeas corpus petitions, without providing the quid pro quo benefits of competent counsel, similarly risks injury to this important interest in human liberty.

To be sure, as the *Lonchar* Court recognized, Congress has the power to establish statutes of limitation on habeas filings. *Id.* at 1301. By enacting Chapter 154, Congress has exercised that power to make a six month limitation *potentially* applicable to states. Presumably, Congress could have made Chapter 154 applicable to all states, regardless of their provision of competent counsel to state prisoners for state collateral review. However, Congress has not done so, and it has entrusted to the federal judiciary the responsibility and obligation for determining whether Chapter 154 applies to a given state.[8]

8. *See, e.g.*, Powell Committee Report at 3242 ("[I]t is more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies . . . The final judgments as to the *adequacy* of any system for the appointment of counsel [], however, rests ultimately with the federal judiciary. . . . [T]he adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation.") (emphasis in original); 1991 Analysis, 137 Cong.Rec. at S3220 ("The latitude afforded to the states in defining specific standards of counsel competence is also desirable . . . [However], *[a]t a minimum*, the immediate benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings, and these states focus on an [sic] articulate standards of competence for such appointments.") (emphasis added); *id.* at 3222 (pointing out that proposed § 2261, codified in the 1996 Act as § 2265, "would extend the chapter to states with adequate unitary review procedures") (emphasis added).

Defendants suggest that now that Congress has enacted such potentially applicable limitations, the Court would inappropriately impose hardship on California were it to exercise its equitable powers to enjoin California from receiving the benefits of the Act. However, the Supreme Court's cautioning against judicial action which "lightly" imposes a statute of limitation in the absence of congressional action, *Lonchar*, 116 S.Ct. at 1301, counsels equally against this Court allowing defendants to effectively impose a potentially applicable statute of limitation where it concludes that California does not qualify for such an application.

As the Supreme Court emphasized, "given the importance of a first federal habeas petition, it is particularly important that any rule that would deprive inmates of all access to the writ should be both clear and fair." *Id.* at 1302. The same is true of California's allegedly comprehensive scheme, and of this Court's review of that scheme. As discussed below, however, California's scheme falls far short of this standard. Indeed, as the Ninth Circuit recently emphasized, the June 6, 1989 Policies that defendants contend constitute the core of the alleged scheme are "difficult to articulate," have been "applied only randomly," and were, at least until *In re Clark*, 855 P.2d 729 (1993), neither clear, nor well-established. *Morales v. Calderon*, 85 F.3d 1387, 1393 (1996) ("express[ing] no opinion as to whether the California Supreme Court has sufficiently narrowed the timeliness standards or applied them consistently since Clark").

Whether, as plaintiffs assert, defendants' effective deprivation of their rights under Chapter 153 constitutes "deprivation" within the meaning of 42 U.S.C. § 1983 raises difficult legal questions. However, as a factual matter, the Court finds that defendants' threats have

caused plaintiffs to forgo their statutory rights and that, absent relief from this Court, defendants' threats will continue to cause such injury.

Any doubts as to whether defendants' assertions are causing plaintiffs to forego their rights under Chapter 153 are readily relieved by consideration of what plaintiffs' position in this regard would be if defendants had, instead, stated that they planned to establish a unitary review procedure that would allow them in the future to invoke Chapter 154's benefits. In such a situation, plaintiffs would not face the unconscionable dilemma discussed above, and would continue to exercise their statutory and constitutional rights. While Defendants certainly have a fundamental First Amendment right to express their views in this regard, the Court concludes that the manner in which they have done so has put plaintiffs in a very different position with respect to their habeas corpus rights than they would be if defendants had not done so.[9]

4. Procedural Background

In the thirty days following plaintiffs' filing of this action on April 24, 1996, the Court held three hearings and received six rounds of briefing on the matter. On May 2, at the close of the show cause hearing on plaintiff's application for a "Temporary Restraining Order, Temporary Declaratory Relief, and Preliminary Injunctive Relief," the Court granted plaintiffs' application for a

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9. Thus, for instance, it is clear that plaintiffs' rights have not been harmed by recent statements of elected officials regarding California's present efforts to reform its mechanism for providing competent counsel to capital defendants pursuing collateral review, even though the State presumably hopes to opt-in to Chapter 154 via these reforms. *See* Mike Lewis, *Capital Appeals Overhaul Starts With Money*, Daily J., May 28, 1996, at 1.

temporary restraining order ("TRO").[10] On May 13, at the close of the hearing on plaintiff's application for a preliminary injunction, the Court modified and extended the TRO for an additional ten days. *See Ashmus v. Calderon*, No. C96-1533 TEH (N.D.Cal. May 15, 1996) (Order Modifying and Extending TRO). And on May 24, one day after the hearing on plaintiff's expedited motion for provisional class certification, defendants' expedited motion to dismiss, and other matters raised in the parties' supplemental briefs, the Court issued a brief order addressing the outstanding issues presented by the parties.

In addition, on May 31, defendants filed an Ex Parte Application for Partial 5-Day Stay of Final Order and Judgment, for the sole purpose of facilitating defendants' anticipated application to the Ninth Circuit for a stay pending appeal. On June 3, Defendants filed an Ex Parte Application for Partial Stay of Final Order and Judgment Pending Appeal, asking the Court partially to stay its order, in lieu of defendants' seeking such a stay from the Ninth Circuit. In the event that any of the following Conclusions of Law are deemed to be Findings of Fact, they are incorporated by reference as Findings of Fact.

CONCLUSIONS OF LAW

In the event that any of the foregoing Findings of Fact are deemed to be Conclusions of Law, they are incorporated by reference as Conclusions of Law.

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10. In the week following this Court's issuance of the TRO, defendants sought emergency stays from both the Ninth Circuit and the United State Supreme Court, and applied for an emergency writ of mandamus to the Ninth Circuit. Each of these requests was summarily denied.

I. PRELIMINARY ISSUES

Defendants have raised a number of threshold questions concerning the Court's power to hear this case, including challenges to plaintiffs' standing, the ripeness of their claims, and the existence of a cognizable cause of action. As the Supreme Court has explained, these issues are related to, but analytically distinct from the threshold question of jurisdiction.

> Thus it may be said that *jurisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case, see *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 384, 4 S.Ct. 510, 512, 28 L.Ed. 462 (1884); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912 (1951); *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, *see Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975); *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and relief is a question of the various remedies a federal court may make available.

Davis v. Passman, 442 U.S. 228, 239 n. 18, 99 S.Ct. 2264, 2274, 60 L.Ed.2d 846 (1979) (emphasis in original).

A. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Section 1331 confers jurisdiction upon the Court over "all civil actions arising under the Constitution, laws, or treaties of the United States." A lawsuit "arises under" federal law if (1) federal law creates the cause of action, or (2) "the resolution of the dispute depends upon the validity, construction, or effect of federal law, so long as the federal question is a real and substantial issue." *City Nat. Bank v. Edmisten*, 681 F.2d 942, 945 (4th Cir.1982). Plaintiffs seek a declaratory judgment that Chapter 153, rather than the expedited provisions of Chapter 154, governs federal review of his state court conviction and death sentence. Thus, they have alleged facts sufficient to confer jurisdiction under either prong of this test: The Declaratory Judgment Act creates their cause of action, *see Samuels v. Mackell*, 401 U.S. 66, 70, 91 S.Ct. 764, 766, 27 L.Ed.2d 688 (1971) (declaratory judgment is "essentially an equitable cause of action"), and the dispute depends upon the construction and effect of the 1996 Act.

The Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3), because, as discussed below, plaintiffs have sufficiently alleged a cause of action under 42 U.S.C. § 1983.

B. Standing

Article III requires a plaintiff to be sufficiently adversary to a defendant to create an actual case or controversy. A plaintiff must show that he has personally suffered some actual or threatened injury as a result of the conduct challenged in the lawsuit, that the injury can be fairly traced to the challenged actions, and that the injury is likely to be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992).

Plaintiff Ashmus and each member of the plaintiff class satisfy these requirements. As noted above, plaintiffs are suffering "actual" injury because defendants have asserted, and, absent judicial relief, will continue to assert falsely that Chapter 154 governs plaintiffs' ability to file and pursue federal habeas proceedings. Because of the uncertainty created by defendants' assertions, plaintiff Ashmus will be forced to comply with Chapter 154 and to structure his habeas litigation accordingly. Other members of the plaintiff class will be similarly affected. The fact that the provisions of Chapter 154 could not directly apply to plaintiff until his "finalized" petition is filed at some point in the future is no more of a bar to standing than it is to ripeness. *See, e.g., New York v. United States*, 505 U.S. 144, 175, 112 S.Ct. 2408, 2428, 120 L.Ed.2d 120 (1992) (rejecting ripeness objections to New York's challenge of a statutory provision that, three and one-half years in the future, would require it to take title to low-level radioactive waste on the grounds that "New York must take action now in order to avoid the take title provision's consequences"). Thus, plaintiffs are suffering "actual" injury, and that injury can be fairly traced to defendants actions. Accordingly, plaintiffs satisfy Article III's case or controversy requirement.[11]

Defendants challenge to plaintiffs' standing focuses almost entirely on the fact that the six-month statute of limitations created by Chapter 154, *see* 28 U.S.C. § 2263(a), which defendants believe "began running on April 24, 1996, as to plaintiff and all other death row inmates

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11. Defendants do not dispute that plaintiffs satisfy the redressability prong of standing.

whose judgments were affirmed on or after June 6, 1989,"[12] expires after August 2, 1996, the presumptive filing deadline for plaintiff Ashmus at the time that he filed the instant action.[13] However, defendants ignore the fact that plaintiff Ashmus must be afforded the right to understand the consequences of filing such a petition. Plaintiff must know, prior to drafting the finalized petition, whether 28 U.S.C. § 2264's limitations on federal courts' substantive review of habeas petitions ultimately will apply to the Court's review of his constitutional claims. He must also know whether to file a petition, as ordered by this Court, that contains exhausted and unexhausted claims. Finally, plaintiff must know whether § 2266's rigid time limitations for adjudication of his petition apply.

C. Ripeness

The basic purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . ." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). To achieve this purpose, the doctrine sets forth a "twofold" analysis, requiring the Court to balance "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. at 1515. Both parts of this balancing test strongly favor the Court's resolution of the present dispute.

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12. Defs.' Supp.Briefing at 7 n. 5.

13. Although this filing deadline has since been vacated, plaintiff cannot rely on this fact to establish that he had standing when he filed this action.

The first part of the test examines the extent to which the issues are sharply focussed. Where, as here, the issue for analysis is, as defendants' acknowledge, "a virtually pure question of law," the issues are generally considered to be sufficiently focussed. *Id.*; *see also Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 300-01, 99 S.Ct. 2301, 2309-10, 60 L.Ed.2d 895 (1979) (noting that in such cases, postponement serves no purpose); *id.* at 303-04, 99 S.Ct. at 2311-12 (noting that, by contrast, postponement is appropriate where precise factual circumstances will affect constitutional analysis). That some of the plaintiffs may be able to exercise control over some of the harm alleged (e.g., by filing petitions prior to the deadline) does not alter this conclusion. *Id.* at 303-05, 99 S.Ct. at 2311-12; *Clements v. Fashing*, 457 U.S. 957, 961-62, 102 S.Ct. 2836, 2842-43, 73 L.Ed.2d 508 (1982).

Plaintiffs similarly satisfy the second prong of the ripeness test, the hardship factor. "The most important aspect of the hardship determination is a clear recognition that a decision of legal relationships often should be available before irrevocable commitments are made." 13A Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3532.4, at 167 (2d ed. 1984). As noted above, plaintiffs have convincingly demonstrated to the Court that, absent judicial relief, they will need to make such commitments with regard to their litigation resources and strategies. The impact of defendants' conduct on plaintiffs is thus "sufficiently direct and immediate to render the issue appropriate for judicial review at this stage." *Abbott*, 387 U.S. at 152, 87 S.Ct. at 1517.

Defendants' ripeness challenge rests primarily on their statute of limitations argument, rejected above, and

on their belief that, regardless of Chapter 154's applicability, the Act's revised standards of review will apply to plaintiff Ashmus based on the Act's amendments to Chapter 153. *See* Act, Pub.L. 104-132, § 104(3)-(4), 110 Stat. 1219 (revising 28 U.S.C. § 2254(d)-(e)). Plaintiffs persuasively contest the latter point and request that,

> to ensure that an appellate court does not misunderstand this Court's view of the "standing" and "ripeness" issues raised by defendants and the scope of the relief requested, this Court should declare that the amendments to Chapter 153 do not apply to plaintiff Ashmus and the approximately 144 other California death row inmates who invoked federal habeas jurisdiction prior to April 24, 1996.

Pls.' Reply to Class Cert. at 3 n. 2.

For the reasons set forth in plaintiffs' First Reply, and in the thorough retroactivity analysis in *Wilkins v. Bowersox*, 933 F.Supp. 1496, 1502-1506 (W.D.Mo., 1996),[14] the Court agrees that the relevant provisions of

14. *See also, e.g., Williams v. Calderon*, 83 F.3d 281, 286 & n. 2 (9th Cir.1996) (noting that "the Act does not provide an effective date for the general habeas provisions [i.e., Chapter 153]" and assuming, "without deciding, that section 2253(c)(2) of the Act does not apply retroactively . . ."); *Warner v. United States*, 926 F.Supp. 1387, 1390 (E.D.Ark.1996) (holding that amendments to § 2255 do not apply retroactively); *United States v. Trevino*, 1996 WL 252570 n. 1 (N.D.Ill. May 10, 1996) (same); *Centanni v. Washington*, 1996 WL 251438 at *1 (N.D.Ill. May 8, 1996) (expressing doubt that amendments to Chapter 153 apply retroactively); *Schlup v. Bowersox*, No. 4:92CV443-JCH at 17 (E.D.Mo. May 2, 1996) (holding that Congress did not intend the amendments to § 2254 to apply retroactively); But *see Leavitt v. Arave*, 927 F.Supp. 394, 398 (D.Id.1996) (concluding that applying

the Act, § 104, do not apply retroactively. Accordingly, the Court holds that s 104's amendments to 28 U.S.C. § 2254 do not render the present controversy unripe.

Nonetheless, the Court rejects plaintiffs' suggestion that it should therefore declare Chapter 153, either in whole, or in part, inapplicable to plaintiffs. Plaintiffs' complaint does not explicitly pray for such relief. In the absence of such a prayer, the Court does not believe that such relief is warranted.[15]

D. Cause of Action

"The concept of a 'cause of action' is employed specifically to determine who may judicially enforce the statutory rights or obligations." *Davis v. Passman*, 442 U.S. 228, 239, 99 S.Ct. 2264, 2274, 60 L.Ed.2d 846 (1979). The key question is whether a particular plaintiff is a

amended versions of §§ 2244, 2253, and 2254 to pending cases would not have retroactive effect); *Bean v. Calderon*, No. CIV S-90-0648 WBS/GGH at 7 (E.D.Cal. May 8, 1996) (applying amended § 2254 to a pending case without discussing its retroactivity); *Williams v. Calderon*, No. CV. F- 89-160-REC-P, at 5-7, 9, 16-17 (E.D.Cal. April 29, 1996) (holding, in the alternative, that certain provisions of Chapter 153 apply retroactively), affirmed on other grounds, *Williams v. Calderon*, 83 F.3d 281 (9th Cir.1996).

15. Concededly, plaintiffs' complaint and moving papers manifest their assumption that Chapter 153 would not apply retroactively. Defendants' ripeness challenge similarly manifests defendants' assumption that Chapter 153 did apply retroactively to pending cases. Accordingly, to the extent that the retroactivity of Chapter 153 impacts the ripeness issue, the Court is obligated to resolve the issue in determining the justiciability of the instant action. However, with respect to Chapter 153's retroactivity, plaintiffs have failed to explain why the Court is similarly obligated to exercise its discretionary jurisdiction to grant the declaratory relief they requested in subsequent briefing.

member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court. The answer "depends not on the quality or extent *1062 of [plaintiffs'] injury, but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue. The focus must therefore be on the nature of the right petitioner asserts." *Id.* at n. 18.

The Court concludes that plaintiffs fall within the class of litigants whom Congress intended to confer rights upon via the Declaratory Judgment Act. *See Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 119, 110 S.Ct. 444, 455-56, 107 L.Ed.2d 420 (1989) (Kennedy, J., dissenting); *Samuels v. Mackell*, 401 U.S. 66, 70, 91 S.Ct. 764, 766-67, 27 L.Ed.2d 688 (1971) (declaratory judgment is "essentially an equitable cause of action"); Fed.R.Civ.P. 57, 1937 Advisory Committee Notes ("The existence or nonexistence of any right . . . may be declared."). Unquestionably, plaintiffs also fall within the class of people whom Congress intended to confer rights upon under the habeas corpus provisions of Chapters 153 and 154.

Whether plaintiffs also have stated a cause of action cognizable under 42 U.S.C. § 1983 presents a more difficult question. Plaintiffs contend that the existence of a § 1983 cause of action in this case is controlled by a straightforward application of *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). *Steffel* and its progeny, *see, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619, 625 n. 1, 106 S.Ct. 2718, 2722 n. 1, 91 L.Ed.2d 512 (1986); *Carey v. Population Services Int'l.*, 431 U.S. 678, 683 n. 3, 97 S.Ct. 2010, 2015 n. 3, 52 L.Ed.2d 675 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-32, 95 S.Ct. 2561, 2567-68, 45 L.Ed.2d 648 (1975); *Fordyce v. Seattle*, 55 F.3d 436, 440 (9th Cir.1995), involved threatened prosecution or

administrative action under a state or local law claimed by plaintiff to be unconstitutional. In each case, the Court held that the fact that state courts might, in the event of prosecution, find the state law unconstitutional did not prevent the threatened prosecution from qualifying as state action creating a federal cause of action pursuant to 42 U.S.C. § 1983. Thus, it is clear that in appropriate circumstances, the threats of state officials to assert an unlawful legal position can give rise to a cause of action under § 1983.

Focussing on the nature of the challenged state action, defendants have pointed out several reasons why these cases are potentially distinguishable from the instant case. The Court recognizes that applying the principles underlying *Steffel* to the instant case represents a novel application. However, the Court believes that defendants have misperceived the relevance of these cases to the instant action. The relevant focus is not the nature of

state action,[16] but the nature of the harm that Steffel and other courts have held to be cognizable under § 1983.

> [T]he Supreme Court has mandated that Section 1983 be "'broadly construed against all forms of official violation of federally protected rights.'" *Dennis v. Higgins*, 498 U.S. 439, 444, 111 S.Ct. 865, 869, 112 L.Ed.2d 969 (1991), *quoting Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-701, 98 S.Ct. 2018, 2040-41, 56 L.Ed.2d 611 (1978). Threatened harm that has not yet occurred, but that will occur unless judicial relief is afforded is enough to support a civil rights claim. *See, e.g., Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 431-32, 107 S.Ct. 766, 774-74, 93 L.Ed.2d 781 (1987).

Thorsted v. Gregoire, 841 F.Supp. 1068, 1083 (W.D.Wa.1994), aff'd, 75 F.3d 454 (9th Cir.1996). Accordingly, the Court believes that the mere fact that another actor--whether it's the state court in the threatened prosecution cases, or the federal court in the instant case--may limit the harm caused by defendants' conduct does not defeat a cause of action under 42 U.S.C. § 1983.

In *Steffel*, the uncertainty caused by state officials' threats to prosecute plaintiff under an allegedly unconstitutional statute caused plaintiff to forego his First Amendment rights to free speech. In *Thorsted*, the uncertainty created by state officials' threats to enforce an allegedly unconstitutional term limits measure caused plaintiffs to forego rights secured by the First and Fourteenth Amendments, as well as the Qualifications Clause. In the instant case, the uncertainty created by defendants' threats is causing plaintiffs to forego their rights, under Chapter 153, not to be executed without a federal court's determination that their conviction and sentence does not offend the U.S. Constitution. The denial of these rights "is a particularly serious matter . . . , risking injury to an important interest in human liberty." *Lonchar v. Thomas*, ___ U.S. ___, ___, 116 S.Ct. 1293, 1299, 134 L.Ed.2d 440 (1996).

Defendants have appropriately cautioned the Court that in extending well-established precedent to issues of first impression, courts should be mindful of the need to establish a principled basis on which to limit that extension. This case readily provides such a limiting

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16. Plaintiffs have adequately alleged the presence of state action, as defendants, at one point at least, seemed to concede. *See* Defendants' 2d Opp.Mem. at 4 ("[Plaintiff] observes that state officials 'act under color of state law' when they litigate, a proposition we do not dispute.") Defendants subsequently cited to *Rosas v. Brock*, 826 F.2d 1004 (11th Cir.1987), for the proposition that any relevant conduct of theirs in this case is action "under color of federal law."

In *Rosas*, the State of Florida entered into a contractual agreement with the federal government to administer the Disaster Unemployment Assistance Program. Pursuant to the federal agreement, state employees reviewed unemployment applications, applied federal regulations, and determined that Mr. Rosas was ineligible for federal aid. Noting that "the challenged action by state employees is nothing more than the application of federal rules," the Eleventh Circuit concluded that "the federal involvement in those cases is so pervasive that the actions are taken under color of federal and not state law." *Id.* at 1007 (emphasis added). Here, however, the involvement of the federal judiciary has been triggered by state officials' independent assertions of the state's eligibility under Chapter 154. As noted above, defendants' conduct thus constitutes the heart of the dispute. Accordingly, "the state cannot be characterized as a purely passive actor so as to preclude Section 1983 liability." *Mitson v. Coler*, 670 F.Supp. 1568, 1576 (S.D.Fl.1987); *see also Martin v. Heckler*, 773 F.2d 1145, 1154 (11th Cir.1985) (en banc).

principle. As the Supreme Court has repeatedly emphasized over the past two decades, *see, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204-05, 51 L.Ed.2d 393 (1977), and as Congress' enactment of Chapter 154 vividly exemplifies, "death is [] different." *Cf.* 13A Wright, Miller, & Cooper, Federal Practice and Procedure § 3532.5 at 185 (2d Ed.1984) (noting, in the related context of ripeness, that courts' "willingness to protect against even prospective burdens of compliance is enhanced if especially valuable interests seem to be at stake"). Thus, while the cognizability of plaintiffs' § 1983 cause of action is not entirely free from doubt, the Court concludes that, in the context of this case, plaintiffs have raised sufficiently serious questions to warrant the preliminary injunctive relief requested.

II. CLASS CERTIFICATION

On May 6, 1996, pursuant to Civil Local Rules 7-10 and 23-2, plaintiffs moved on an expedited basis to have their motion for provisional class certification heard on May 13, together with the preliminary injunction hearing already scheduled for that time. In response to defendants' vigorous objection that a May 13 hearing would not allow sufficient time to undertake the "rigorous analysis" required under Rule 23, *see General Telephone of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982), the Court set the class certification hearing for ten days later, on May 23. The Court notes however, that defendants' brief analysis of the requirements of Rule 23(a) and their failure even to mention, in their brief, two of the bases proposed by plaintiff to maintain this action under Rule 23(b), belies their suggestion that anything less than the "normal" 35-day briefing schedule provided for by this Court's local rules would prejudice their ability to address the merits of

class certification.[17] *See* Defs.' Opp'n to Exp.Mot. at 4-5.

Plaintiff seeks to certify a class consisting of all prisoners who have been sentenced to death by the State of California and are currently awaiting execution. To qualify for class certification, plaintiff must first satisfy the four prerequisites enumerated in Fed.R.Civ.P. 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. In addition to these prerequisites, plaintiff must satisfy one of the bases for maintaining a class action listed in Rule 23(b).

Plaintiff bears the initial burden of demonstrating that Rule 23's requirements have been met. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D.Cal.1994); *see also, Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975) (noting that because class certification inevitably involves some speculation, plaintiff need only present "sufficient information [for the court] to form a reasonable judgment"), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976). The district court has broad discretion in determining whether to certify a class,

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17. Defendants' opposition to class certification focussed largely on the standing of named plaintiff Troy Ashmus to bring this suit, and on the ripeness of his claim. Defendants are free to present any arguments they deem appropriate, and standing and ripeness are, of course, threshold concerns in every suit. The jurisdictional arguments addressed in the first two-thirds of defendants' opposition to class certification, however, had already been addressed and explored in the parties' earlier oral and written arguments.

Defendants' comments are also at odds with their efforts to get this case to the appellate level as soon as possible and their unwillingness, at the May 3 hearing, to stipulate to a period longer than 10 days for the TRO.

however, and its determination "should not be overturned on review unless it is shown that the district court abused its discretion." *Spectrum Financial Companies v. Marconsult, Inc.*, 608 F.2d 377, 382 (9th Cir.1979), cert. denied, 446 U.S. 936, 100 S.Ct. 2153, 64 L.Ed.2d 788 (1980). The Court concludes that plaintiff has met his burden and that provisional certification is warranted in this case.

A. Rule 23(a)

1. Numerosity

Plaintiffs seek to certify a class consisting of all prisoners who have been sentenced to death by the State of California. By its express terms, Chapter 154 applies, in qualifying states, to all members of the class who petition for habeas corpus in federal courts. 28 U.S.C. § 2261(a) ("This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence."). Plaintiffs assert that the class contains approximately 439 persons, with approximately two unknown members being added to the class each month.[18] Defendants do not dispute plaintiffs' numerical estimates. Rather, they contend that the appropriate class consists only of the approximately 52 death row inmates who, like plaintiff, have state death judgments that became final after June 6, 1989, and who have not yet filed federal habeas corpus petitions. Having thus redefined the class, defendants claim that plaintiffs fail to satisfy the numerosity requirement because death row inmates in California are easily located, easily identified, and "are engaged in litigation or will be." Defs.' Opp'n to Class Cert. at 10-11.

18. Pls.' Compl ¶ 20; Defs.' 1st Opp'n. at 7 n. 1.

Defendants correctly note that the *current* members of the class are easily identified and easily located. However, for several reasons, their claim that class representation is thus inappropriate lacks merit. First, solely by virtue of the undisputed fact that two to three "unnamed and unknown future" persons are being added to the class each month, joinder in this case is "inherently impracticable." *Jordan v. Los Angeles County*, 669 F.2d 1311, 1320 (9th Cir.), vacated on other grounds, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982). Second, while there is no exact numerical formula for determining whether a class is sufficiently numerous, *see, e.g., Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir.1980), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981), the Ninth Circuit has indicated that even by defendants' own estimate of 52 class members, the numerosity requirement is satisfied here. *Jordan*, 669 F.2d at 1319 (reversing district court's denial of class certification and noting that "we would be inclined to find the numerosity requirement in the present case satisfied *solely* on the basis of the number of ascertained class members, i.e., 39, 64, and 71") (emphasis added). Third, given the undisputed fact that more than a quarter of the proposed class members are without counsel and likely to remain so for some time,[19] the likelihood that these individuals will engage in litigation against defendants at some point in the future hardly renders their joinder in this action practicable.

Defendants' efforts to redefine the class similarly lack merit. With one exception, these efforts are based on distinctions between class members that are irrelevant to the requirements of Rule 23. First, as discussed below, all members of the proposed class share common questions of law and of fact. Second, defendants' claim that the

19. Defs.' 1st Opp'n Mem. at 16; Pls.' Ex. 5 at A1.

proposed class members whose cases are currently pending in state court have no cause of action and therefore should not be included in the class runs directly counter to Supreme Court precedent. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153, 40 L.Ed.2d 732 (1974) ("In determining the propriety of a class action, the question is not whether . . . the plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.") (quoting *Miller v. Mackey International*, 452 F.2d 424, 427 (5th Cir.1971)). In addition, defendants ignore the fact that Chapter 154's applicability will affect these individuals' decisions about how best to preserve federal habeas review of constitutional claims, when and whether to seek certiorari, and whether they are entitled to "reasonable litigation expenses." Third, defendants' suggestion that prisoners who have already filed federal habeas petitions should be excluded from the class, presumably because the filing deadline will not apply to them, ignores the remaining provisions of Chapter 154 that Congress expressly made applicable to pending capital habeas petitions. Death Penalty Act, Pub.L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996) (Chapter 154 "shall apply to cases pending on or after the date of enactment of this Act.").

Defendants have raised one important distinction, however, that the Court's May 24 order did not sufficiently take into account. During the course of this litigation, defendants have conceded that California's alleged comprehensive scheme does not apply to death row inmates whose judgments became final prior to June 6, 1989. Accordingly, defendants argued, these inmates will "not be subjected to any 'unlawful' argument by state officials about the application of federal law." Defs.' Opp'n to Class Cert. at 10.

Based on plaintiffs' contentions that these concessions contradicted some of the very assertions by defendants that gave rise to this action, and on the Court's own concerns that defendants' concessions might not be legally enforceable in subsequent actions, the Court provisionally included such persons in the certified class. Upon reconsideration, however, the Court concludes that the roughly 50 persons whose judgments were affirmed prior to June 6, 1989, should *not* be included in the class. Accordingly, and good cause appearing, the Court hereby MODIFIES the provisionally certified class to exclude such individuals.

2. Commonality

The existence of common questions of law alone, or of fact alone, satisfies the commonality requirement. *Cottrell v. Virginia Elec. & Power Co.*, 62 F.R.D. 516, 519 (E.D.Va.1974). The requirement is met by the alleged existence of a common practice by defendants; the defendants' actions need not affect each member of the class in the same way. *Arnold*, 158 F.R.D. at 448. Whether Chapter 154 applies in California and whether defendants' assertions in this regard are harming death row inmates in California are the central questions presented by this case. Standing alone, these questions, which plaintiffs have demonstrated are common to all members of the class, satisfy the commonality requirement. Nehmer v. U.S. Veterans' Admin., 118 F.R.D. 113, 117 (N.D.Cal.1987) ("Courts have frequently certified classes whose members share a common threat of future harm.").

Plaintiffs' complaint and brief list a litany of additional factual and legal questions that are common to members of the class. Pls.' Compl. ¶¶ 21-22; Pls.' Class Cert. Mot. at 6 (e.g., whether California has a unitary

review procedure; whether California has a statute or rule providing for standards of competency for the appointment of counsel in unitary review procedures; whether defendants have threatened to assert that Chapter 154 applies to all or some members of the class; whether, if California has the appropriate mechanisms and rules required by 28 U.S.C. § 2265, it has broadly failed to comply with the specific requirements of those mechanisms and rules; and whether California has entered an order by court of record appointing counsel for all indigent death row inmates who have accepted offers of counsel).

Defendants have not specifically objected to the commonality of any of these questions. Rather, they have simply asserted that because "plaintiff has no existing case or controversy with defendants on the issue of Chapter 154's application[,] [h]e therefore presents no questions of law and fact common to or typical of the proposed class." Defs.' Opp'n to Class Cert. at 12-13. As noted above, the Court has concluded that plaintiff has standing. The Court hereby finds that the questions of law and of fact identified by plaintiffs are indeed common to all members of the plaintiff class. Accordingly, the Court holds that plaintiffs have satisfied the commonality requirement.

3. Typicality

The typicality requirement is satisfied if the "class representative[s] ... possess the same interest and suffer the same injury as the class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977). Typicality does not require that the named plaintiff's claims be identical to those of the other class members. Moreover, a finding of commonality will ordinarily support a finding of typicality. *Falcon*, 457 U.S. at 157 n. 13, 102 S.Ct. at 2370

n. 13. Aside from the jurisdictional arguments previously rejected by the Court, defendants have failed to identify any manner in which the class representative's claims or defenses are atypical. The Court finds that the class representative possesses the same interests and suffers the same injury as other class members. Accordingly, plaintiffs have satisfied the typicality requirement.

4. Adequacy

Two factors are considered in determining whether a case satisfies the requirement of fair and adequate representation. First the class representative's interests must be coextensive with and not antagonistic to the interests of the remainder of the class. Second, plaintiff's counsel must be fully competent to prosecute the action as a class action. *Jordan*, 669 F.2d at 1322. "[T]he attorney's zeal, competence, and experience are factors relevant to the District Court's exercise of discretion" in the appointment of counsel. *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 43 (N.D.Cal.1977).

Defendants do not appear to contest that plaintiffs have satisfied this requirement. The Court finds that the named plaintiff's interests in challenging the applicability of Chapter 154 are identical to the interest of the remainder of the proposed class.[20] Moreover, plaintiffs'

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20. At oral argument, defendants did appropriately note that the Court should not assume that all members of the proposed class will necessarily oppose application of Chapter 154's requirements to their habeas corpus petitions. Defendants may be correct, but this speculation hardly suffices to show that class certification is unwarranted. *See, e.g., Probe v. State Teachers' Retirement System*, 780 F.2d 776, 781 (9th Cir.) (noting that the fact that some class members may believe a challenged state retirement plan is legal does not create "conflict" sufficient to render class certification improper), cert. denied, 476 U.S. 1170 (1986).

counsel are fully competent to prosecute this case in a class action. Numerous state and federal courts, including this Court, have appointed the attorneys for plaintiffs to represent indigent prisoners under sentence of death. The Court finds that plaintiff has satisfied the adequacy requirement.

B. Rule 23(b)

In addition to satisfying the prerequisites listed in Rule 23(a), plaintiff must demonstrate that this action falls within one of the three categories enumerated in Rule 23(b). So far as relevant here, Rule 23(b) is satisfied where:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b).

Here, plaintiffs seek to maintain the action under either Rule 23(b)(1) or 23(b)(2). To satisfy subsection (b)(2), two factors must be present: (1) the defendants' action or refusal to act must be generally applicable to the class; and (2) injunctive and declaratory relief must be requested for the class. Plaintiffs have clearly demonstrated that both factors are present. First, defendants conduct, the assertions that California satisfies the opt-in provisions of Chapter 154, affect each member of the class, and indeed, have been directed at each member of the proposed plaintiff class. *See Christman v. American Cyanamid Co.*, 92 F.R.D. 441, 453 & n. 34 (N.D.W.Va.1981) (defendants conduct is "generally applicable" to the class if the defendant has adopted a pattern of activity that is likely to be the same as to all members of the class; "defendant need not have acted directly against each member of the class"). Second, plaintiffs have alleged, and the Court has concluded, that injunctive and declaratory relief are appropriate with respect to the class as a whole. The Court notes that Rule 23(b)(2) was specifically drafted to facilitate vindication of civil rights, particularly where, as here, that vindication can be remedied through injunctive relief. *See* Rule 23, Advisory Committee's Note to the 1966 Amendments; *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir.1980).

This action is also appropriately maintained under both bases listed in subparagraph (b)(1). Defendants did not address either basis in their papers, although they did assert at oral argument that plaintiffs failed to satisfy the requirements. The Court disagrees. Prosecution of separate actions by or against plaintiffs would create precisely the risk of inconsistent adjudications and the resultant incompatible standards of conduct for defendants that the Rule was expressly designed to prohibit. Indeed, at the May 13 hearing, defendants argued that the Court

should refrain from enjoining defendants for this very reason: so that other district courts would have the opportunity to reach a different conclusion regarding the applicability of Chapter 154. Similarly, Rule 23(b)(1)(B) is satisfied here because adjudications with respect to individual members would, "as a practical matter, be dispositive of the interests of the other class members." Fed.R.Civ.Pro. 23(b)(1)(B). For instance, were a district court to find that California qualified under Chapter 154, nonparty class members would, as a practical matter, have no choice but to comply with 28 U.S.C. § 2263(a)'s filing deadline. If the Ninth Circuit or the Supreme Court subsequently held otherwise, the nonparty class members would have effectively foregone their rights under Chapter 153 without any opportunity to litigate the matter.

C. Legitimacy of Class Action in This Case

At the May 23 hearing, defendants for the first time raised two additional arguments in opposition to class certification. First, defendants claimed that class certification is usually used for a "terminal purpose." In the instant case, by contrast, defendants claim that plaintiffs' sole purpose in seeking class certification is momentarily to "disrupt" all pending federal capital habeas proceedings in California to resolve Chapter 154's applicability, and then to send the cases back to the district courts where they are currently pending. Second, and relatedly, defendants suggest that by granting plaintiffs' requested relief, the Court would somehow inappropriately or illegitimately deprive other federal district courts in California of their independent duty and responsibility to address the applicability of Chapter 154.

Defendants have neither briefed nor cited authority for either proposition. With respect to the first objection, the Court notes that, even assuming, arguendo, that class

certification is only appropriate where the suit will terminate the controversy between the parties,[21] this case certainly satisfies that requirement. Plaintiffs have asked the Court to declare whether Chapter 154 applies to all state prisoners sentenced to death in California. Whether the Court answers affirmatively or negatively, its answer will terminate the controversy over this question.

With regard to defendants' second objection, the Court is mindful of the limitations that Article III and Congress have imposed upon its jurisdiction. The Court is also sensitive to both the appearance and the reality of any action that might somehow illegitimately or inappropriately impose its view on its sister district courts. At the same time, however, the Court bears an obligation to resolve questions properly brought before it by litigants.

In this case, plaintiffs have availed themselves of two devices created by Congress to help litigants in appropriate circumstances: the "remedial arrow" of the Declaratory Judgment Act, *see Wilton v. Seven Falls Co.*, 115 S.Ct. 2137, 2143 (1995), and the expediency and economy of Rule 23's various mechanisms for bringing a class action, *see Falcon*, 457 U.S. at 155. The Court believes that it is obligated to resolve the question as plaintiffs have presented it. The Court has done so, to the best of its ability. If the Court is mistaken, the appellate courts will correct it. In the interim, the Court's decision

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21. The Supreme Court's decision in *Eisen* strongly suggests that no such additional requirement exists. *See Eisen, supra*, 417 U.S. at 178, 94 S.Ct. at 2153 (1974) ("In determining the propriety of a class action, the question is ... whether the requirements of Rule 23 are met.") (internal citations omitted); *see also Garcia*, 618 F.2d at 267 ("Whether a class should be certified depends entirely on whether the proposal satisfies the requirements of Fed.R.Civ.P. 23.") (emphasis added).

may constrain the ability of other co-equal district court judges to decide the issue differently. Far from being an illegitimate or inappropriate exercise of its power, however, the Court believes that it was obligated to reach such a decision.[22]

In the end, defendants' second objection simply restates their repeatedly expressed belief that Troy Ashmus should have brought this controversy before the Court through a different vehicle (i.e., by way of a motion in his federal habeas proceedings currently before the Court in *Ashmus v. Calderon*, C93-0594 TEH). Had plaintiff done so, the Court's decision would not have directly affected other district courts' resolution of Chapter 154's applicability to California. However, plaintiff did not bring the motion as defendants would have liked. Instead, plaintiff brought this action. The Court is required to resolve the question as it in fact was presented, not as defendants wish it had been presented.

D. Conclusion

For the reasons discussed above, and good cause appearing, plaintiffs shall provisionally maintain this matter as a class action on behalf of a class consisting of the following persons:

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22. Although neither party briefed the issue, the Court notes that its jurisdiction under the Declaratory Judgment Act is discretionary. *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995). After reviewing the factors raised in *Karussos*, however, the Court has concluded that, at the very least, exercise of its discretionary jurisdiction is proper in this case; indeed, the Court believes, failure to exercise its jurisdiction in this case would arguably be an abuse of that discretion.

All prisoners who have been sentenced to death by the State of California and are currently awaiting execution pending resolution of their state and federal challenges to their state convictions and sentences, except those such persons whose convictions and sentences were affirmed on direct appeal prior to June 6, 1989.

Plaintiff Troy A. Ashmus shall be the named class representative. The Court shall retain the power to modify, amend, or revoke the class certification throughout the pendency of the action.

III. STATUTORY FRAMEWORK

A. Overview

As noted above, Chapter 154 provides two "opt-in" procedures, the so-called "post-conviction" procedure (§ 2261) and the "unitary review" procedure (§ 2265). Defendants concede, and the Court has previously held, that California does not qualify under § 2261's "post-conviction" procedure. California's eligibility for Chapter 154's benefits thus depends on whether the state has complied with the provisions of § 2265.[23]

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23. Plaintiffs contend that § 2261 sets forth basic requirements that also apply to states opting in under s 2265's unitary review procedure. Viewed in isolation, the language of § 2261(a) appears to support this interpretation: "This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply *only if* the provisions of subsections (b) and (c) are satisfied." 28 U.S.C. § 2261(a) (emphasis added). Congress' use of the term "only" suggests that independent of any requirements for unitary review established in § 2265, any opt-in procedure must satisfy § 2261(b) and (c) to qualify the state for the benefits of Chapter 154.

The threshold question for determining compliance with § 2265 is whether the state has created "a 'unitary review' procedure." If a state has a unitary review procedure, then it qualifies under § 2265 if (1) "the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings," § 2265(a); (2) "The rule of court or statute [] provides standards of competency for appointment of such counsel," *id.*; and (3) the State also properly establishes the requisite mechanism for offering and appointing counsel pursuant to § 2265(b). Failure to comply with any of these mandatory requirements is fatal to a state's ability to opt-in under § 2265.

B. Does California Authorize Unitary Review?

"A 'unitary review' procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral

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However, the Court rejects this reading, for two reasons. First, it would render the entirety of § 2265 mere surplusage, in direct contravention of s 2265(a)'s provision that "*This chapter shall apply* , as provided in this section, in relation to a State unitary review procedure" that complies with the additional requirements of section 2265. Second, it is impossible for a case to simultaneously satisfy the requirements of § 2261(b) and the requirements of § 2265(a). The Court's reading is also supported by the fact that § 2261(a)'s "only if" language comes from the Powell Committee's original 1989 report, whereas § 2265's unitary review procedure was added later to "extend the potential application of the [Powell Committee's] proposed procedures to states having 'unitary review' systems in capital cases." 1991 Analysis, 137 Cong.Rec. at S3221-22. Accordingly, except insofar as § 2261(c) is expressly incorporated by § 2265(b), the Court holds that § 2261 is inapplicable here.

attack." § 2265(a). Focussing on the term "unitary review," plaintiffs interpret this provision to mean that the state must allow collateral issues to be reviewed in the same proceeding or proceedings as the direct appeal. In other words, plaintiff claims, unitary review means a "single procedure affording identical substantive review and disposition of direct review and collateral claims." Pls.' Mem. at 9.

The plain language of the statute, however, provides that the State procedure need only "*authorize*[] a person under sentence of death to *raise*, in the course of direct review of the judgment, such claims ..." § 2265(a) (emphasis added). "When a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992).

Several references in the legislative history also support the view that California has the type of unitary review procedure that would potentially qualify states for the benefits of the Act.[24/] The utility of this legislative

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24. House Report at 18 ("Proposed 28 U.S.C. § 2261 [codified as § 2265] contains provisions that make the Powell Committee procedures *potentially* applicable to states, such as California, which have adopted unitary review systems in capital cases that involve review of collateral claims concurrently with direct review of the judgement.") (emphasis added); 1991 Analysis, 137 Cong.Rec. at § 3221 (March 13, 1991) ("California, for example, has adopted a unitary review procedure for capital cases by rule of its Supreme Court"); Daniel E. Lungren, Report on Death Penalty Habeas Corpus Reforms, 137 Cong.Rec. S8716, S8717 (June 26, 1991) ("Lungren Report") ("California has adopted a unitary review procedure in capital cases."); see also Defs.' Ex. N. at 10, Minority Report of A.B.A. Task Force on Habeas Corpus Reform Co-Chairman Malcolm M. Lucas, reprinted in Ira P. Robbins, "Toward A More Just and

history is undermined, however, by the fact that many of the same speakers made statements supporting plaintiffs' view.[25] This very inconsistency demonstrates precisely why legislative history is never dispositive, and is only resorted to when congressional intent is not clear from the face of the statute. Here, congressional intent is clear from the face of the statute. The procedure, to qualify, need only authorize persons under sentence of death to raise such claims as could otherwise be raised collaterally.

California authorizes capital petitioners to raise such claims during the course of direct review. *See* June 6, 1989 Policies, Timeliness Standards 1-1 to 1-1.2; *see also, e.g., In re Neely*, 6 Cal.4th 901, 906, 922, 26 Cal.Rptr.2d 203, 864 P.2d 474 (1993); *People v. Mayfield*, 5 Cal.4th 142, 197, 209, 19 Cal.Rptr.2d 836, 852 P.2d 331 (1993),

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Effective System of Review in State Death Penalty Cases", 40 Am.U.L.Rev. 1, 200 (1990) ("[The California Supreme Court] promulgated standards ... requiring appellate counsel in capital cases to promptly 'investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus' and to file such petition 'without substantial delay' (concurrent with the appeal, if possible).") (quoting June 6, 1989 Policies, Timeliness Standard 1).

25. *See, e.g.*, Lungren Report, 137 Cong.Rec. at S8717 (The proposed Act "[a]uthorizes [a] state unitary procedure in which appeal and collateral review are handled in [a] *single proceeding* ..."); 1991 Analysis, 137 Cong.Rec. at S3221-22 ("Proposed 28 U.S.C. § 2261 [codified as s 2265] ... would extend the potential application of the proposed procedures to states having 'unitary review' systems for capital cases ... [that] *combine* the normal functions of direct review and collateral attack in a 'unitary review' procedure.") (emphasis added); *see also*, 137 Cong.Rec. S18665, S18674 (Nov. 27, 1991). Interestingly, defendants adopted the identical view in another case in this district. "Section 2265 requires the State to establish a mechanism for appointing counsel with the authority to handle a direct appeal and collateral review in a single proceeding." Pls.' Ex. 7, *Odle v. Calderon* C88-4280 CAL (N.D.Cal.), Resp.Brief at 5 n. 3 (filed April 26, 1996) (emphasis added).

cert. denied, 512 U.S. 1253, 114 S.Ct. 2780, 129 L.Ed.2d 892 (1993). Indeed, although plaintiffs have presented evidence that the California Supreme Court rarely reviews collateral claims together with the direct appeal, exercises seemingly standardless discretion in allowing consolidation of the two types of claims, and does not authorize payment for appointed counsel to investigate all collateral claims, plaintiffs do not seriously dispute that persons sentenced to death are authorized to raise such claims during the pendency of the direct appeal.[26]

Accordingly, the Court holds that California has a unitary review procedure, as that term is defined in the Act. As explained below, however, the Court also concludes that California's alleged comprehensive scheme fails to satisfy the remaining requirements of section 2265, for several independent reasons.

C. Does California have a qualifying mechanism for appointment and compensation of competent counsel?

California's alleged "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel" expressly precludes compensation for raising certain collateral issues. Appellate counsel's

> duty to investigate [factual and legal grounds for the filing of a habeas petition] is *limited* to

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26. In response to the Court's question whether any unresolved factual issues prevent the Court's issuance of final declaratory relief, however, plaintiffs did allege that they can show "that although the state court may not make it 'official,' it routinely has effectively decided the appeal before the habeas petition is filed." Pls.' Supp. Brief at 15.

> investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, *nor does it authorize* the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment.

June 6, 1989 Policies, Timeliness Standard 1-1. (emphasis added). In other words, appointed counsel's duty "is limited [ ] to an investigation of potentially meritorious grounds for habeas corpus which have come to counsel's attention in the course of *preparing the appeal*." *In re Clark*, 855 P.2d 729, 751 (1993) (emphasis added). Only when the facts already "have come to counsel's attention suggesting that a basis for habeas corpus relief may exist," will the policies provide compensation. *Id*. n. 19. The investigation must then be limited to the "specific facts" that are then "known to counsel." *Id*. at 751-52.

As the *Clark* Court explained, the policies thus limit "'fishing expeditions' whose purpose is solely to discover if any basis for collateral attack on a presumptively valid judgment can be found." *Id*. n. 19. However sensible that limitation may be, the Supreme Court has thus construed its own policies as failing to provide indigent condemned inmates with counsel who is authorized or compensated even to investigate, let alone raise, potential collateral claims beyond those that are knowable by reference to the four corners of the appellate record. Even then, appointed counsel is constrained to investigate only the discrete facts and potential issues that are discernable from the record.

These limitations run afoul of § 2265(a)'s express requirement that the unitary review procedure authorize

and provide compensation for capital defendants to "raise, in the course of direct review of the judgement, *such claims as could be raised* on collateral attack." § 2265(a) (emphasis added). The limitations also create an objectively deficient standard for the performance of counsel appointed to seek collateral relief in satisfaction of Chapter 154's quid pro quo arrangement.[27] As the Ninth Circuit has noted, the meaningful assistance of counsel in collateral proceedings is important precisely because it is necessary to enable prisoners to "assert *all* possible violations of his constitutional rights" and thus avoid the risk of defaulting claims that could have reasonably been discovered through diligent investigation. *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir.1991) (emphasis added), cert. denied, 503 U.S. 1011, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992).

The Court's conclusion draws additional support from *Morales v. Calderon*, 85 F.3d 1387 (1996), a Ninth Circuit decision filed after the close of briefing in this case. As the Ninth Circuit emphasized, the June 6, 1989 Policies just discussed are "difficult to articulate," have been "applied only randomly," and were, at least until *In re Clark*, neither clear, nor well-established. *Morales*, 96 C.D.O.S. at 3956-57. While the issue before the Ninth Circuit concerned the timeliness of a petition filed under the Policies, the Court also referred specifically to the duties in question here, which are set forth in Timeliness Standard 1-1. *Id*. at 1390.

The well-established need in this area of the law for rules that are clear and fair also provides some support

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27. Although Congress intended to give states wide latitude in developing such standards, the final decision as to the adequacy of these standards rests squarely with the federal judiciary. *See supra* note 8.

for plaintiffs' argument that California's mechanism is inadequate because the comprehensive scheme is not created by a single rule or statute. As plaintiffs note, § 2265(a) expressly requires the state to establish the appropriate mechanism by "rule of its court of last resort" or by "statute"; "The rule of court or statute must provide standards of competency." Each of these references is in the singular, as are the analogous references in U 2261(b). Defendants, by contrast, argue that "nothing in the language of the 1996 Act supports plaintiff's suggestion that Congress expected or much cared whether the several tasks ... are accomplished by a single passage of printed words or a multitude of such passages." Defs.' 2d Opp'n at 8. The Court notes that the Act's language, if narrowly construed, belies this claim. Defendants' interpretation would essentially require the Court to rewrite the relevant passage ("if the State establishes, *by rule of its court of last resort or by statute* [,] a mechanism....") to eliminate the underlined clause between "establishes" and "mechanism." Nonetheless, the Court is hesitant to embrace plaintiffs' hypertechnical interpretation of the Act, particularly given the existence of other, independent grounds for its holding.

The Court does conclude, however, that even if Congress did not intend that the mechanism must be enacted by a single statute or rule, it undoubtedly did intend to require that the state affirmatively create a system, not come forth with a post hoc rationalization. *See, e.g.*, 1991 Analysis, 137 Cong.Rec. at S3220 ("*At a minimum*, the immediate benefits to defendants would include the requirement that states ... *focus on an[d] articulate* standards of competence ...") (emphasis added). As discussed in the next section, it is readily apparent that California failed to do so. Indeed, the state's competency guidelines, which defendants claim adequately take into account the need for specialized habeas

expertise, were articulated and recommended in 1985. It was not until 1989, however, that capital counsel were required to investigate possible habeas claims. *In re Clark*, 855 P.2d at 751 ("The [June 6, 1989] Policies did, *for the first time*, impose an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus.") (emphasis added). Thus, it is clear that the 1985 guidelines did not "focus on and articulate standards of competence" for counsel to raise collateral claims.

D. Does California Have a Rule of Court or Statute that Provides Standards of Competency for Appointment of Counsel in Unitary Proceedings?

Section 2265(a) provides that "[t]he rule of court or statute must provide standards of competency for the appointment of such counsel." Defendants argue that California satisfies this requirement by virtue of the interaction between U 20 of the Standards of Judicial Administration Recommended by the Judicial Council, and Rules of Court 39.5 and 76.5. Section 20, entitled "Guidelines for Appointment of Counsel in Criminal Appeals," provides that each "appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5 *should* follow the guidelines in this section ..." § 20(a) (emphasis added). Section 20(c) provides:

> The Supreme Court *should* maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program

> concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellants' opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

(emphasis added). These are the only standards of competence identified by defendants.

Section 20 fails to satisfy § 2265(a)'s requirements for three independent reasons: it (1) is not a rule of court or statute; (2) does not impose any binding or mandatory standards; and (3) does not require counsel to have any experience or competence in bringing habeas petitions.

First, section 20, together with the Introductory Statement to the Judicial Council's "rules, standards, and orders," make clear that section 20 is not a rule of court. The Introductory Statement points out that "[t]he Judicial Council is established under article VI, section 6, of the Constitution, and is given various powers and responsibilities to improve the administration of justice." 1996 Cal.Rules of Court at 1 (West 1996). Under its power to "*adopt rules* for court administration," the Judicial Council has adopted certain Rules of Court, which "have the force of law." *Id.* (emphasis added). In addition, and by contrast, under its power to "*make recommendations* to the courts," the Judicial Council has adopted certain nonmandatory standards, id. (emphasis added), such as section 20. The nonmandatory nature of such standards is repeatedly emphasized in the Introductory Statement, and in section 20 itself:

> The nonmandatory nature of the standards is indicated by the use of 'should' instead of the mandatory 'shall'. Standards make

> recommendations on practice and procedure, express goals that courts and judges are urged to try to attain, and state guidelines for discretionary action. Even though courts are not obligated to comply with these recommendations, goals, and guidelines, courts should consider them ...

Id. at 1; *see also, e.g.*, section 20(a) ("Each appellate court ... should follow...."); section 20(b) ("Each Court of Appeal should maintain ..."); section 20(c) ("The Supreme Court should maintain ...").

Second, and relatedly, section 20 does not impose any binding or mandatory standards on the California Supreme Court. Nor have defendants provided any indication that the Supreme Court has followed § 20(c)'s recommendation and adopted these standards as binding upon itself. Defendants attempt to brush aside this objection by asserting that the Act does not require that the standards be "inexorably mandatory."[28] Defs.' 2d

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28. Alternatively, defendants argue that Rules of Court 39.5 and 76.5 somehow render the guidelines mandatory. They do not. Rule 76.5, which governs appointment of counsel in criminal cases, provides in relevant part that "Each Court of Appeal shall maintain at least two lists [of qualified attorneys]. In establishing the lists, the court shall consider the guidelines insection 20 ..." Rule 76.5(b).

Three points bear mentioning. First, Rule 76.5 only requires the court to *consider* the § 20 guidelines. It does not render the guidelines binding or mandatory. Second, Rule 76.5, by its terms, applies only to criminal appeals, not to habeas proceedings. Habeas corpus petitions are considered to be "*original* proceedings seeking release or modification of custody," not appeals from lower courts. Rule of Court 56.5; *In re Carpenter*, 9 Cal.4th 634, 645, (1995) (noting that California Constitution "grants original subject matter jurisdiction over habeas corpus proceedings to the superior court, the Court of Appeal, and [the Supreme Court]"). Third, Rule 76.5's reference to "Each Court of Appeal" almost certainly does not refer

Opp'n at 10. However, the language of the Act and the legislative history discussed above demonstrate that Congress deemed the provision of competent counsel at all stages of proceedings as essential to the quid pro quo tradeoff envisioned under chapter 154. Congress' express and repeated mandate that any qualifying mechanism must provide standards for the appointment of counsel would be meaningless if the decision whether to apply those standards was left to the complete discretion of the court or the guideline administrator.

Defendants do acknowledge that "if and when the supreme court ever finds it necessary to revise its procedures to allow that capital appointments be made on a *standardless* basis, then our review mechanism would no longer comply with the letter or spirit of § 2265." Defs.' May 14, 1996 Supp. Brief at 2 (emphasis in original). The Court agrees, but it also believes that defendants' concession fails to recognize the importance that Congress placed on having mandatory standards. Absent such standards, federal courts would be unable to evaluate the

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to the state Supreme Court. The only citable decision discussing this section failed to interpret the phrase so broadly. *People v. Hackett*, 43 Cal.Rptr.2d 219, 228 (Cal.App.1st Dist.1995); *but see* Rule of Court 61(d) (noting that for the purposes of rules 61 to 69, "Court of Appeal" shall also mean "Supreme Court.")

Next defendants contend that Rule 39.5 resolves "any conceivable ambiguity" about Rule 76.5's application to the Supreme Court's alleged unitary review procedure. Rule 39.5 provides that "[t]he rules *governing appeals* from the superior court in other criminal cases apply to *appeals* from judgments rendering the penalty of death ..." (emphasis added). Rule 39.5 does not render Rule 76.5, let alone s 20, binding on the Supreme Court, for two reasons. First, the rules governing appeals, which appear in Chapter I of the Rules, do not include Rule 76.5, which appears in Chapter IV, governing administrative provisions. Second, Rule 39.5 applies only to criminal appeals; it makes no mention of original habeas proceedings, which are governed by Chapter II's Rule 56.5.

adequacy of a state's mechanism without examining the competency of individual counsel. Such an approach, however, would create the very type of judicial intrusiveness that Congress sought to avoid. *See* Powell Report at 3242 ("The final judgments as to the *adequacy* of any system for the appointment of counsel [ ], however, rests ultimately with the federal judiciary.... [T]he adequacy of the system--as opposed to the competency of particular counsel--can be settled through litigation." (emphasis in original); 1991 Analysis, 137 Cong.Rec. at S3222 ("The chapter would apply to such a procedure if it included appointment of counsel *meeting* articulated standards of competence") (emphasis added); *id*. at S3220.

Third, section 20(a) contains no mention of original habeas proceedings and § 20(c) requires no minimum experience whatsoever in habeas proceedings. Defendants conclusorily assert that the standards do not need to address counsel's qualifications in habeas matters, because "appellate counsel and habeas counsel are one and the same; the competency standards are thus 'unitary' as well." Defs.' 2d Opp'n at 12. Congress almost certainly did intend that the competency standards be "unitary," but such an intention undermines rather than supports defendants' claim that the state's competency standards need not consider counsel's qualifications or experience to raise "off the record" claims. The plain language of the Act evinces Congress' concern with the ability of competent counsel to address collateral claims. *See, e.g.*, § 2265(a) (The State must establish a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of *competent* counsel in the unitary review proceedings, including expenses relating to the litigation of *collateral* claims in the proceedings. The rule of court or statute must provide standards of *competency* for the appointment of such counsel.") (emphasis added); § 2261(b) (mechanism must provide for "competent

counsel in State *post-conviction* proceedings [and] ... The rule of court or statute must provide standards of competency for the appointment of *such* counsel.") (emphasis added); *see also* 1991 Analysis, 137 Cong.Rec. at S3220 ("At a minimum, ... these states [must] focus on an[d] articulate standards of competence for such" collateral proceedings). As noted above, however, the Judicial Council promulgated and articulated the recommended standards more than four years before the California Supreme Court established the policies that require appointed counsel to pursue collateral remedies.

Finally, the Court rejects defendants' assertion that competence in criminal appeals necessarily encompasses competence in bringing habeas petitions. As Judge Godbold, of the Eleventh Circuit, has noted, "[t]he average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy..... [Habeas] is the most complex area of the law I deal with." *"You Don't Have To Be a Bleeding Heart," Representing Death Row: A Dialogue Between Judge Abner J. Mikvah and Judge John C. Godbold*, Human Rights, Winter 1987, at 22, 24; *see also Lonchar v. Thomas*, 116 S.Ct. 1293, L.Ed.2d 440 (1996) (recognizing the "common practice of substitution specialized capital counsel for habeas" as an essential consideration in the development of "fair and effective" habeas reform); Report of A.B.A. Task Force on Habeas Corpus Reform reprinted in Ira P. Robbins, *Toward A More Just and Effective System of Review in State Death Penalty Cases*, 40 Am.U.L.Rev. 1, 71 & n. 79 (1990) (listing several sources noting the singular difficulty and complexity of habeas corpus law).

Accordingly, the Court concludes that California does not comply with § 2265(a)'s requirement that "[t]he rule

of court or statute must provide standards of competency for the appointment of such counsel."

E. Does California's Mechanism Provide the Required Offer and Appointment of Counsel?

Finally, California fails to make a bona fide offer of counsel as required by § 2265(b) & 2261(c). By defendants' own admission, "Every inmate who is awaiting appointment of counsel has been 'offered' counsel and that offer has been accepted; what is pending is the appointment itself." Defendants' 1st Opp.Mem. at 16 (emphasis in original). The failure to appoint counsel after an indigent prisoner has accepted such an offer contravenes the express requirement of § 2261(c), as incorporated by § 2265(b), that the state's procedure "must provide for ... appointment of one or more counsels to represent the prisoner *upon a finding* that the prisoner is indigent and accepted the offer ..." (emphasis added); *see also* 1991 Analysis, 137 Cong. Rec. at S3220 ("*At a minimum*, the *immediate* benefits to defendants would include the requirement that states electing these procedures *actually appoint* counsel for the collateral proceedings ...") (emphasis added).

IV. RELIEF

A. Declaratory Judgement

"In a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a); *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir.1994). The Court has concluded that this case presents an actual controversy that is within its jurisdiction.

Accordingly, the Court has the discretionary power to issue a declaratory judgment.

Declaratory relief is favored where, as here, alternative remedies are less effective or unavailable. Contrary to defendants assertions, case-by-case adjudication of Chapter 154's applicability is not a better or more effective remedy. Case-by-case adjudication not only will involve a multiplicity of suits litigating identical legal and factual issues, but also will do nothing to alleviate the uncertainty giving rise to plaintiffs' claim. The risk that Chapter 154 applies will effectively force plaintiffs whose convictions have been affirmed to file their claims within the six month deadline, possibly resulting in unintentional waiver or inadequate presentation of meritorious claims. This unwitting error might not be remedied in time to stop an execution even if Chapter 154 were later found by a higher court to be inapplicable.

Accordingly, for the reasons discussed above, and good cause appearing, the Court hereby DECLARES that Chapter 154 of Title 28 of the United States Code does not, at the present time, apply to California, because California has failed to comply with the opt-in provisions

of 28 U.S.C. § 2261 or § 2265. The Court further declares that the provisions of Chapter 154 are not applicable to the federal habeas corpus proceedings of any members of the provisionally certified class. This declaration shall remain in effect until and unless the State of California demonstrates to this Court that it has complied with the opt-in provisions of 28 U.S.C. § 2261 or § 2265.

B. Preliminary Injunction

In the Ninth Circuit, in order to be entitled to preliminary injunctive relief, a plaintiff must show one of the following:

> [E]ither (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in [the plaintiff's] favor.

EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 752 (9th Cir.1991). "The alternative standards are not separate tests but the outer reaches of a single continuum. Essentially the trial court must balance the equities in the exercise of its discretion." *International Jensen Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir.1993). A grant or denial of a motion for a preliminary injunction lies within the discretion of the district court, and it will be reversed only if the court relied on an erroneous legal premise or otherwise abused its discretion. *Chalk v. U.S. District Court*, 840 F.2d 701, 704 (9th Cir.1988).

Plaintiffs have satisfied both prongs of the test for preliminary injunctive relief. Prior to issuance of the Court's TRO, defendants' threats to invoke Chapter 154's expedited review provisions were causing plaintiffs to forego rights to which they are entitled under Chapter 153. Defendants' assertions during the course of this

litigation leave little room for doubt that, absent injunctive relief, they will continue to make such threats and assertions.

As a practical matter, defendants' assertions were securing for the State the benefits of the Act, regardless of whether California actually provides the competent counsel that Congress required states to give plaintiffs as a quid pro quo for receiving such benefits. For these reasons, defendants' threats were effectively depriving plaintiffs of rights that the Court has declared they are entitled to under Chapter 153, and, arguably, under the Due Process Clause as well. Whether, as plaintiffs assert, this effective deprivation constitutes "deprivation" within the meaning of 42 U.S.C. § 1983 appears to be a difficult question of first impression. However, at the least, plaintiff has raised serious questions in this regard. Given the balance of hardships in this case and the potential life or death consequences at stake, the Court is obligated to resolve any doubts in plaintiffs' favor and to grant a preliminary injunction.

In addition, and independent of 42 U.S.C. § 1983, the Court finds that injunctive relief is necessary and proper to effectuate the terms of its declaratory judgment. Accordingly, the Court may issue injunctive relief pursuant to 28 U.S.C. § 2202. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

For the foregoing reasons, the Court reaffirms its May 24, 1996 order converting the TRO into a preliminary injunction. Accordingly, as indicated in that order, defendants their agents, servants, employees and attorneys, and all those in active concert with them ARE HEREBY RESTRAINED AND ENJOINED from trying or seeking to obtain for the State of California the benefits of the provisions of Chapter 154 of Title 28,

United States Code, in any state or federal proceeding involving any class member.

V. STAY

Defendants have requested a temporary stay of the Court's injunctive relief and provisional class certification, "solely for the purpose of facilitating defendants' anticipated application to the Ninth Circuit for a stay pending appeal." Good cause appearing, and in deference to the important state interests previously recognized by the Court, the Court hereby STAYS the provisional class certification and preliminary injunctive relief for a period of five (5) days. The Court DENIES defendants' alternative request for this Court to issue a partial stay pending appeal.

CONCLUSION

For the reasons discussed above, and good cause appearing, it is hereby ORDERED that

(1) Plaintiff's request for provisional class certification is GRANTED;

(2) Plaintiff's request for final declaratory relief is GRANTED;

(3) Plaintiff's request for preliminary injunctive relief is GRANTED; and

(4) Defendants' request for a five (5) day partial stay of the Court's order is GRANTED.

IT IS SO ORDERED.

DATED 6/14/96 /s/THELTON E. HENDERSON
THELTON E. HENDERSON, CHIEF
JUDGE
UNITED STATES DISTRICT COURT

CONSTITUTION OF THE UNITED STATES AMENDMENT XI--SUITS AGAINST STATES

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS
CHAPTER 154--SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

§ 2261. Prisoners in State custody subject to capital sentence; appointment of counsel; requirement of rule of court or statute; procedures for appointment

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) This chapter is applicable if a State establishes by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record--

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;

(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the

decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 154--SPECIAL HABEAS CORPUS PROCEDURES IN CAPITAL CASES

§ 2265. Application to State unitary review procedure

(a) For purposes of this section, a "unitary review" procedure means a State procedure that authorizes a person under sentence of death to raise, in the course of direct review of the judgment, such claims as could be raised on collateral attack. This chapter shall apply, as provided in this section, in relation to a State unitary review procedure if the State establishes by rule of its court of last resort or by statute a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in the unitary review proceedings, including expenses relating to the litigation of collateral claims in the proceedings. The rule of court or statute must provide standards of competency for the appointment of such counsel.

(b) To qualify under this section, a unitary review procedure must include an offer of counsel following trial for the purpose of representation on unitary review, and entry of an order, as provided in section 2261(c), concerning appointment of counsel or waiver or denial of appointment of counsel for that purpose. No counsel appointed to represent the prisoner in the unitary review proceedings shall have previously represented the prisoner at trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(c) Sections 2262, 2263, 2264, and 2266 shall apply in relation to cases involving a sentence of death from any State having a unitary review procedure that qualifies under this section. References to State "post-conviction

review" and "direct review" in such sections shall be understood as referring to unitary review under the State procedure. The reference in section 2262(a) to "an order under section 2261(c)" shall be understood as referring to the post-trial order under subsection (b) concerning representation in the unitary review proceedings, but if a transcript of the trial proceedings is unavailable at the time of the filing of such an order in the appropriate State court, then the start of the 180-day limitation period under section 2263 shall be deferred until a transcript is made available to the prisoner or counsel of the prisoner.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 2. THE JUDICIAL COUNCIL
ARTICLE 1. GENERAL PROVISIONS

§ 68511.5. Selection of appointed counsel to handle criminal appeals by indigent defendants

Not later than January 1, 1985, the Judicial Council shall adopt rules of court regulating the selection of appointed counsel, other than the State Public Defender, to handle criminal appeals by indigent defendants. These rules shall establish procedures for the appointment of counsel in all appellate districts. In developing these rules, the Judicial Council shall consider the need to include screening of eligible appointees, the need to match the skills and experience of the attorney with the demands of the case and the process by which this might be done, and the need or desirability of evaluating an attorney's performance before assigning the attorney to another case. Further, in developing these rules, the Judicial Council shall consult with local bar associations and the Office of the State Public Defender.

WEST'S ANNOTATED CALIFORNIA CODES
GOVERNMENT CODE
TITLE 8. THE ORGANIZATION AND GOVERNMENT OF COURTS
CHAPTER 1. GENERAL PROVISIONS

§ 68070. Rules of court; authority to make; restrictions; uniformity

(a) Every court may make rules for its own government and the government of its officers not inconsistent with law or with the rules adopted and prescribed by the Judicial Council. These rules shall not:

(1) Impose any tax, charge, or penalty upon any legal proceeding, or for filing any pleading allowed by law.

(2) Give any allowance to any officer for services.

(b) The Judicial Council shall adopt rules or procedures to encourage uniformity of requirements throughout a court and statewide. The subjects on which uniformity should be sought shall include, but are not limited to, (1) the form of papers, (2) limitations on the filing of papers, (3) rules relating to law and motion, and (4) requirements concerning documents to be filed at or prior to trial.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES
RELATING TO THE SUPREME COURT AND
COURTS OF APPEAL
CHAPTER IV. ADMINISTRATIVE PROVISIONS
GOVERNING REVIEWING COURTS

Rule 76.5. Appointment of counsel in criminal appeals

(a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.

(b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA RULES OF COURT
APPENDIX TO CALIFORNIA RULES OF COURT
DIVISION I. STANDARDS OF JUDICIAL ADMINISTRATION RECOMMENDED BY THE JUDICIAL COUNCIL

§ 20. Guidelines for appointment of counsel in criminal appeals

(a) [General] Each appellate court, when establishing and maintaining lists of qualified counsel for appointment in criminal appeals as required by rule 76.5, should follow the guidelines in this section to match each appointed attorney's skills and experience with the demands of the case. Before appointment of counsel in a case, the court should determine the demands of the case by reviewing the trial court file or by other appropriate means. In determining the demands of the case, the following factors should be considered: the length of the sentence; the novelty or complexity of the issues; the length of the trial and of the reporter's transcript; and any questions relating to the competency of trial counsel.

(b) [Courts of Appeal] Each Court of Appeal should maintain three lists of qualified attorneys. The lists should be based on the following minimum qualifications:

List I (For appointment to cases in which probation was granted, or the sentence is five years or less in state prison): (1) active membership in the state bar; (2) attendance at one approved appellate training program; (3) participation in one trial or appellate brief; and (4) submission of one sample of the attorney's writing for review by the court or administrator.

List II (For appointment to cases in which the sentence is five years to fifteen years in state prison): (1) active practice of law for 18 months in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of two appellate cases; and (4) submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

List III (For appointment to cases in which the sentence is fifteen years to life in state prison): (1) active practice of law for three years in the California state courts or equivalent experience; (2) attendance at two approved appellate training programs; (3) completion of five appellate cases; and (4) submission of two appellant's opening briefs written by the attorney, for review by the court or administrator.

(c) [Supreme Court] The Supreme Court should maintain a list of attorneys for appointment in death penalty cases, based on the following minimum qualifications: (1) active practice of law for four years in the California state courts or equivalent experience; (2) attendance at three approved appellate training programs, including one program concerning the death penalty; (3) completion of seven appellate cases, one of which involves a homicide; and (4) submission of two appellant's opening briefs written by the attorney, one of which involves a homicide, for review by the court or administrator.

WEST'S ANNOTATED CALIFORNIA CODES
PENAL CODE
PART 2. OF CRIMINAL PROCEDURE
TITLE 9. APPEALS FROM SUPERIOR COURTS
CHAPTER 1. APPEALS, WHEN ALLOWED AND HOW TAKEN, AND THE EFFECT THEREOF

§ 1241. Compensation and expenses for court-appointed counsel

In any case in which counsel other than a public defender has been appointed by the Supreme Court or by a court of appeal to represent a party to any appeal or proceeding, such counsel shall receive a reasonable sum for compensation and necessary expenses, the amount of which shall be determined by the court and paid from any funds appropriated to the Judicial Council for that purpose. Claim for the payment of such compensation and expenses shall be made on a form prescribed by the Judicial Council and presented by counsel to the clerk of the appointing court. After the court has made its order fixing the amount to be paid the clerk shall transmit a copy of the order to the State Controller who shall draw his warrant in payment thereof and transmit it to the payee.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA SUPREME COURT
SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENTS OF DEATH

Policy

1. Stays of execution.
2. Withdrawal of counsel.
3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions.

Adopted by the Supreme Court Effective June 6, 1989

Policy 1. Stays of Execution

The Court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for a writ of habeas corpus filed in this court, or to permit certiorari review by the United States Supreme Court.

Policy 2. Withdrawal of counsel

The court will consider a motion to withdraw as attorney of record only if appropriate replacement counsel is ready and wiling to accept appointment for appropriate postappeal representation related to the case.

Policy 3. Standards governing filing of habeas corpus petitions and compensation of counsel in relation to such petitions

The Supreme Court promulgates these standards as a means of implementing the following goals with respect to petitions for writs of habeas corpus relating to capital cases: (i) ensuring that potentially meritorious habeas

corpus petitions will be presented to and heard by this court in a timely fashion; (ii) providing appointed counsel some certainty of payment for authorized legal work and investigation expenses; and (iii) providing this court with a means to monitor and regulate expenditure of public funds paid to counsel who seek to investigate and file habeas corpus petitions.

For these reasons, effective June 6, 1989, all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards:

1. Timeliness standards

1-1. Appellate counsel in capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal. It does not impose on counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment. Instead, counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a claim. All petitions for writs of habeas corpus should be filed without substantial delay.

1-1.1. A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 90 days after the final due date for the filing of appellant's reply brief on the direct appeal.

1-1.2. A petition filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.

1-1.3. Alternatively, a petition may establish absence of substantial delay if it alleges with specificity facts showing that although petitioner or counsel was aware of the factual and legal bases for the claim before January 16, 1986 (the date of finality of *In re Stankewitz* (1985) 40 Cal.3d 391, 396-397, fn. 1 [220 Cal.Rptr. 382, 384, fn. 1, 708 P.2d 1260, 1262, fn. 1]), the petition was filed within a reasonable time after that date. 1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

2. Compensation standards

2-1. This court's appointment of counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court; (iii) preparation and filing of habeas corpus petitions and other ancillary pleadings in the California Supreme Court; (iv) preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court and, if certiorari is granted, preparation

and filing of a brief or briefs on the merits and preparation and presentation of oral argument; (v) representation in the trial court relating to proceedings pursuant to Penal Code sections 1193 and 1227; and (vi) preparation and filing of a petition for clemency with the Governor of California no earlier than after exhaustion of the initial round of collateral challenges in federal court. Absent prior authorization by this court, this court will not compensate counsel for the filing of any other motion, petition, or pleading in any other California or federal court or court of another state. Counsel who seek compensation for representation in another court should secure appointment by, and compensation from, that court.

2-2. Appellate counsel should expeditiously investigate possible bases for filing a petition for a writ of habeas corpus. As a general rule, this investigation should be done concurrently with review of the appellate record and briefing on appeal. Requests by appointed counsel for authorization to incur, and reimbursement of, investigation expenses shall be governed by the following standards:

2-2.1. Without prior authorization of the court, counsel may incur expenses up to a total of $3,000 for habeas corpus investigation, and may submit claims to the court for reimbursement up to that amount. The court will reimburse counsel for expenses up to $3,000 that were reasonably incurred.

2-2.2. If after incurring $3,000 in expenses, counsel determines it is necessary to incur additional expenses for which he or she plans to seek reimbursement from the court, counsel must seek and obtain prior authorization from the court. As a general rule, the court will **not** reimburse counsel for expenses exceeding $3,000,

without prior authorization of the court. Requests by appointed counsel for prior authorization to incur investigation expenses shall be governed by the following standards:

2-3. On or before the date the appellant's opening brief on appeal is filed, counsel shall file with this court a "Confidential request for authorization to incur expenses to investigate potential habeas corpus issues." The court will entertain an initial request filed at a later time only if good cause for the delay is shown.

2-4. The confidential request for authorization to incur expenses shall set out:

2-4.1. The issues to be explored;

2-4.2. Specific facts that suggest there may be an issue of possible merit

2-4.3. An itemized list of the expenses requested for each issue of the proposed habeas corpus petition; and

2-4.4. (a) An itemized listing of all expenses previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner.

2-5. Counsel generally will not be awarded compensation for fees and expenses relating to matters that are clearly not cognizable in a petition for a writ of habeas corpus.

2-6. When a petition is pending in this court to exhaust claims presented in a federal habeas corpus petition, a request by counsel for investigative funds to bolster or augment claims already presented in the petition normally will be denied absent a showing of strong justification for the request. A request for investigative funds may be granted if the petitioner demonstrates that he or she has timely discovered new and potentially meritorious areas of investigation not previously addressed in the petitioner's federal or state petitions. This has been the internal operating policy of the court since December 16, 1992.

2-7. Each request for fees relating to a habeas corpus petition must be accompanied by: (a) An itemized listing of all fees previously sought from, and/or approved by any court of this state and/or any federal court in connection with any habeas corpus proceeding or investigation concerning the same judgment and petitioner; (b) A statement summarizing the status of any proceeding or investigation in any court of this state and/or any federal court concerning the same judgment and petitioner; and (c) A copy of any related petition previously filed in any trial and/or lower appellate court of this state and/or any federal court concerning the same judgment and petitioner.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA SUPREME COURT
PAYMENT GUIDELINES FOR APPOINTED COUNSEL REPRESENTING INDIGENT CRIMINAL APPELLANTS IN THE CALIFORNIA SUPREME COURT

Revised by the Supreme Court of California
December 22, 1993

Previously Revised September 19, 1990
Amended Effective January 1, 1997

Guideline

I. Introduction
II. Reasonable Compnsation.
III. Necessray Expenses.
IV. Fee and Expense Disallowances.

I. Introduction

The California Supreme Court determines the compensation of appointed counsel representing indigent criminal appellants. The guidelines set forth below are a general statement of the factors considered by the court in determining appropriate compensation for the time devoted to indigent criminal appeals (and related habeas corpus representation) and the reasonable and necessary expenses incurred by appointed counsel. In reviewing these guidelines, counsel should bear in mind the following:

A. Although most of the guidelines apply routinely, the application of others, such as the reimbursement of travel expenses or of the cost of expert witnesses and investigators, depends on the circumstances of each case.

B. The rates in the guidelines are subject to periodic change. These include the hourly compensation of appointed counsel, mileage and per diem rates for travel, and rates for the reimbursement of the cost of services by others.

C. For the most current information concerning these matters, and the payment guidelines generally, counsel are encouraged to contact the California Appellate Project (CAP). CAP is the appointed counsel administrator that assists private counsel with automatic appeals. CAP's address and telephone number are as follows:

California Appellate Project
One Ecker Place, Suite 400
San Francisco, CA 94105
(415) 495-0500

II. Reasonable Compensation

A. Compensation Rate. The compensation rate for members of the State Bar of California who are appointed as counsel in indigent criminal appeals is the same allowable-hour rate appointed counsel received or was eligible to receive in the Court of Appeal, except for automatic appeals, for which the rate is $98 per allowable hour.

B. "Allowable Hours". The compensation rate is multiplied by the number of "allowable hours" of appellate work to determine a reasonable sum for compensation. Benchmarks for "allowable hours" in capital cases (i.e., an estimate of the time an attorney experienced in the handling of criminal appeals might devote to the various stages of capital litigation) are set out below, in part II.*J*.3.

C. Recording of Hours. Appointed counsel should record the number of hours devoted to the following phases of appellate work:

1. Record review.
2. Record correction.
3. Motions and applications.
4. Sixty-day status reports.
5. Researching and writing opening brief.
6. Researching and writing reply brief.
7. Researching and writing supplemental brief(s).
8. Investigating and writing habeas corpus petition.
9. Reply to response(s) to habeas corpus petition.
10. Evidentiary hearing.
11. Oral argument (includes preparation).
12. Post-oral argument representation.
13. Rehearing petition or opposition.
14. Certiorari petition or opposition.
15. Client communication.
16. Travel.
17. Other services (specify).

D. Factors Considered by the Court. The following factors are considered by the court in determining the number of allowable hours:

1. Whether the billed hours are within the benchmarks, or whether there exists good cause to depart from the benchmarks.
2. Length of the record.
3. Complexity and novelty of the legal issues.
4. Quality of work.

E. Exceptional Procedural Matters. Counsel should provide the court with an explanation of the time spent on exceptional procedural matters, such as repeated applications for augmentation of the record on appeal.

F. Travel Time. Travel time will be compensated to the extent that the time could not reasonably be spent working on the case.

G. Circumstances Warranting Additional Compensation. If counsel believes there exist extraordinary circumstances that justify compensation beyond that set out in these guidelines, counsel should bring such factors to the attention of the court at the time a claim for payment of compensation and expenses is presented. Counsel's showing of justification should be commensurate with the extent to which he or she seeks to exceed the benchmarks.

H. Submission of Payment Requests. Counsel may submit a request for payment of compensation and expenses every 90 days.

I. Special Rules for Capital Cases. The following rules apply to capital cases only:

1. *Delay in Certification of Record or Filing of Brief.* If delay in the certification of the record on appeal or in the filing of the appellant's opening brief (AOB) is due to a lack of diligence on the part of appointed counsel, payment of compensation will be deferred until the record is certified or the AOB is filed.

2. *Forms and Reports.* Counsel must submit a cumulative hours compensation form and the most recent status report with every request for payment. The cumulative hours compensation form will be provided by the court or may be obtained from CAP. Counsel should retain a copy of each cumulative hours compensation form submitted. These forms will facilitate completion of the data form for automatic appeals, which must accompany the request for final payment for services rendered in this

court. Note that although a request for payment may be submitted every 90 days, a current status report must be submitted every 60 days.

3. *"Allowable hours" Benchmarks.* The court, in consultation with CAP, has established the following benchmarks for the various stages of capital representation:

Appeal.

Record Review: 50 pp./hr.

Record Correction: 20-80 hrs.

Client Communication: 15-30 hrs.

Appellant's Opening brief (AOB): 260-600 hrs.

Appellant's reply brief (ARB): 55-160 hrs.

Oral argument: 40-80 hrs.

Supplemental briefs: 20-80 hrs.

Rehearing petition: 25-75 hrs.

Certiorari petition: 40-75 hrs.

Briefing and argument in the United States Supreme Court after grant of certiorari: Counsel shall seek compensation for such services from the United States Supreme Court. Should that court deny compensation for such services, this court will authorize reasonable compensation for such services up to a maximum of $5,000.

Habeas Corpus Briefing.

Investigate and present habeas petition: 140-330 hrs.

Traverse/informal reply: 50-120 hrs.

Habeas Corpus Evidentiary Hearing.

Preparation: 150-300 hrs.

Evidentiary hearing: 72-144 hrs. (i.e., 3-6 days)

Post-hearing litigation before the referee: 75-125 hrs.

Post-Hearing Briefs In The Supreme Court.

Brief on the merits, Response brief, and Supplemental brief: 50-150 hrs.

These benchmarks are guidelines for the expected hours in "typical" cases, and are neither ceilings nor floors for fees in any given case. The court will continue to monitor its fee payment data to determine whether adjustment of the benchmarks is warranted in the future.

Counsel is advised to review the benchmarks carefully, and to bear the following in mind throughout the course of representation (i.e., at each "stage" of the litigation):

a. The "lower range" of the benchmarks A case that has a relatively short record (i.e., 3,000-6,000 pages), and that raises standard (albeit fact-specific) issues already resolved in prior cases, should generally produce hours near

or below the "lower range" of the benchmarks. Based on experience, the court expects a substantial percentage of cases to be completed under the lower range of the benchmarks.

Counsel should determine at an early stage of representation whether the case meets the description of a "lower range" case. If counsel has such a case, and submits a fee request substantially exceeding the lower range of the benchmarks for any particular stage of the litigation, he or she must include in each request a detailed explanation of why fees exceeding the lower range of the benchmarks should be awarded. The court will award fees substantially exceeding the appropriate benchmark range only if it is convinced that on the facts of the case, such fees are warranted.

b. The "upper range" of the benchmarks Based on experience, the court anticipates a number of cases will produce fee hours at or near the upper range of the benchmarks, and occasionally, over that range. The following important caveats apply in such cases:

The upper range of the benchmarks is generally reserved for those cases with relatively long records (i.e., 10,000 or more pages), *and* that raise novel or difficult issues. The mere fact that the record may be long does *not* indicate that "upper range" or "over-benchmark" hours will be appropriate in any or each stage of the litigation.

If a case does not meet the above description of an "upper range" or "over-benchmark" case, counsel should not expect to receive "upper range" or "over-benchmark" fees. In order to secure such fees in a case not otherwise meeting the above description, counsel must include in the request a detailed explanation of why the fees requested should be awarded. The court will award fees near or exceeding the appropriate benchmark range only if it is convinced that on the facts of the case, such fees are warranted.

4. *Second Counsel "Override".* In cases in which appointed counsel deems it necessary to associate with second counsel, and the court approves the association, the court may in its discretion, and on a showing of good cause, approve compensation to appointed counsel for hours incurred exceeding the "appeal" through "habeas briefing" benchmarks by 5-15 percent. As a general rule the court will allow the full 15 percent override in cases in which counsel divides the hours fairly evenly for the stage for which fees are sought. If counsel divides the work less evenly, the override will be diminished accordingly. The court will continue to monitor the cases to determine whether the 15 percent ceiling should be increased.

III. Necessary Expenses

A. Items not Qualifying as Expenses. The hourly fee should cover all overhead related to a case, including secretarial services, word processing, and the like. Expenses listed below will be reimbursed to the extent they are itemized, reasonable, and necessarily incurred during the course of the appeal, and otherwise comply with the court's procedures (see below, part III.B). Note that these guidelines apply not only to appointed counsel,

but to those persons, including experts and investigators, who assist appointed counsel with the appeal.

B. Prior Approval. Prior approval is required for extraordinary expenses, such as for out-of-state travel, expert witnesses and investigators. In capital cases, expense requests are governed by the court's "Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to Such Petitions," published in the Official Reports advance sheets, pamphlet No. 7 (Mar. 13, 1997), rules pages 1-5. (See id., std. 2-1 et seq.)

C. Reimbursable Expenses. In general, when making a request for reimbursement, counsel must itemize all expenses, and must provide in the request the original receipts for the following: (i) travel expenses (airfare, car rental, hotel bills, etc.) over $47 per day; (ii) telephone and copying expenses over $50 and $100 per month, respectively (see below); and (iii) all other single transactions that exceed $100. Counsel should keep all receipts in the event documentation is later required.

1. *Photocopying.* The cost of photocopying will be reimbursed, at not more than 10 cents per page, whether the copying is done inside or outside counsel's office. If counsel represents that photocopying was billed at 10 cents per page or less, receipts will not be required unless the expenses are in excess of $100 per month.

2. *Postage and Delivery Costs.* Expenses for express mail/messenger service will be reimbursed only on a showing that use of express mail/messenger service was necessary and reasonable.

3. *Telephone Charges.* Receipts will not be required unless the expenses are in excess of $50 per month.

4. *Travel Expenses.*

a. The court will determine the reasonableness and necessity of travel expenses on a case-by-case basis. Counsel are cautioned that travel expenses are not considered necessary when the purpose of a trip may reasonably be accomplished in another way, such as by telephone or correspondence. Further, counsel should use the least expensive alternative means of travel. For motor vehicles, the current mileage rate is 27.5 cents per mile.

b. When travel is required by appointed counsel or a person authorized to assist appointed counsel, reasonable and necessary meals and lodging may be claimed, to the extent allowed under State Board of Control rules. Counsel should contact CAP for further information.

c. Some of the lesser known provisions of the Board of Control rules are as follows:

(1) The per diem allowance does not apply for trips of 25 miles or less.

(2) Lunch is not covered unless the travel period is 24 hours or more.

(3) The cost of collision coverage in a contract for a rental car is not covered.

5. *Computerized Legal Research.* The reasonable cost of computerized legal research (as opposed to the costs of installation and monthly access fees), when the use is specifically attributable to the case, will be reimbursed to the extent reasonably and necessarily incurred. Counsel must explain in writing the specific nature of the computer expenses (e.g., Shepard's, Autocite, issue searches, etc.),

and must explain why computerized research was more efficient than the same research performed "manually."

6. *Services of Law Clerks, Paralegals, and State Bar Members.*

a. Counsel shall be reimbursed for the compensation of the following individuals at the following rates:

(1) Law clerks who are not members of the State Bar of California at $25 per allowable hour.

(2) Paralegals at $25 per allowable hour.

(3) Members of the State Bar of California at the rate at which appointed counsel is paid (currently $98 per allowable hour for capital cases).

b. Reimbursement of the compensation for all persons performing legal services, other than appointed counsel, shall be subject to the following conditions:

(1) In submitting a claim for reimbursement, counsel shall describe with specificity the legal services and number of hours of work performed by each other person so the court can evaluate the reasonableness of the services and expenses as part of appointed counsel's overall claim. It is expected that the hours devoted to legal services by associate counsel, and any "exceptionally high" hours attributed to law clerks and paralegals (i.e., hours exceeding 30 percent of the benchmark hours for appointed counsel for any given stage), will reduce the

hours that appointed counsel will devote to those services.

(2) Appointed counsel shall not delegate to others those functions that require the ability and experience for which counsel was appointed.

(3) Appointed counsel shall supervise and have full responsibility for the services performed by others.

7. *Services of Investigators and Experts.*

a. An investigator or expert shall be compensated at a rate not to exceed the maximum rates listed below. Counsel must establish that use of an expert's services is reasonably necessary under the facts of the case. Counsel seeking to use the services of multiple experts relating to a single or common issue must demonstrate a compelling necessity for such use of multiple experts. In addition, counsel must include in the request a representation that the rate requested

(1) does not exceed the investigator's or expert's customary rates for the services performed, and

(2) is consistent with local prevailing rates for the services performed.

b. The maximum rates are as follows:

(1) Investigators, $40 per hour.

(2) Penalty phase consultants, $50 per hour.

(3) Psychiatrists and other mental health experts, $125 per hour.

(4) Other forensic experts, $125 per hour.

(5) Attorneys serving as experts, $100 per hour. (Note: Until an order to show cause is issued, or the People submit an expert declaration in their informal opposition to a habeas corpus petition, the court will not approve payment for attorney "expert opinion" in the form of declarations, etc.)

(6) Any expert listed above testifying at a court proceeding, $600 per day or $350 per half day.

c. In exceptional circumstances, when the need for services at a greater rate of compensation is documented and prior authorization is obtained from the Supreme Court, compensation beyond the maximum may bc paid.

IV. Fee And Expense Disallowances

The court will provide reasons in writing for fee disallowances of $1,000 or more, and expense disallowances of $500 or more.

WEST'S ANNOTATED CALIFORNIA CODES
CALIFORNIA SUPREME COURT
GUIDELINES FOR FIXED FEE APPOINTMENTS, ON OPTIONAL BASIS, TO AUTOMATIC APPEALS AND RELATED HABEAS CORPUS PROCEEDINGS IN THE CALIFORNIA SUPREME COURT

[Introduction]
1. Fixed Fee Categories
2. Incidental and Investigative Expenses
3. Requests for Additional Fees
4. Case Evaluation
5. Progress Payments
6. Conversion from Times and Costs Appointment to Fixed Fee
7. Second Counsel
8. Valuation and Length of Record on Appeal
9. Applicability of Supreme Court Policies Regarding Cases Arising From Judgments of Death

(Adopted by the Supreme Court December 14, 1993, effective January 1, 1994)

[Introduction][1]

Presently, appointed counsel in automatic appeals are compensated on a "time and costs" basis, under the Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court (as revised [Off. Reps. Adv. Pamp. No. 20 (1996) Rules pp. 6-15; West's Cal. Rules of Court (State ed. 1997) pp. 1037-1041][2]) (hereafter Payment Guidelines).

1. Caption editorially supplied.

2. Edition, year, and page references updated by Publisher at request of Reporter of Decisions.

Under the Payment Guidelines, appointed counsel must submit a detailed and lengthy cumulative hours compensation form with every request for payment of fees and reimbursement of expenses. Moreover, "allowable hours" benchmarks limit the fees available for each stage of the capital representation; other provisions limit or exclude reimbursement for expenses. Requests for prior approval of extraordinary expenses are governed by the Supreme Court Policies Regarding Cases Arising From Judgments of Death (as revised [Off. Reps. Adv. Pamp. No. 20 (1996) Rules pp. 1-5; West's Cal. Rules of Court (State ed. 1997) pp. 1033-1035][3]).

In an effort to provide appointed counsel in capital cases greater predictability, consistency and control over compensation and expenses, and to reduce administrative burdens on both counsel and the Court, the Court has adopted an optional fixed fee and expenses payment system.

The following categories of fixed fees comprise appointed counsel's compensation for all hourly services and expenses: (1) on the direct appeal, through the filing of a certiorari petition to the United States Supreme Court, or an answer thereto (but not including any briefs or appearances in the United States Supreme Court after grant of certiorari or any briefs or appearances on remand to the California Supreme Court, which work would be compensated under the terms and limitations of the Payment Guidelines), (2) on the state habeas corpus investigation, through the filed habeas corpus petition and

request of Reporter of Decisions.

3. Edition, year, and page references updated by Publisher at request of Reporter of Decisions.
(adopted, eff. Jan. 1, 1994. As amended, eff. Sept. 1, 1995)

informal reply (but not including any traverse, habeas corpus evidentiary hearing or post-hearing briefs in the California Supreme Court, which work would be compensated under the Payment Guidelines), (3) any trial court proceedings under Penal Code sections 1193 and 1227 to set an execution date, and (4) any clemency petition to the Governor. (See Cal.Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, Compensation Stds., std. 2-1.)
(Adopted, eff. Jan 1, 1994. As amended, eff. Sept. 1, 1995.)

1. Fixed Fee Categories

Category I: $85,000.

A. An appeal from a judgment based on a guilty plea and penalty phase; or

B. An appeal from a judgment on remand following a reversal limited to penalty.

C. Caveat: An appeal from a judgment on limited remand for a new hearing on the automatic motion to modify the death verdict (Pen.Code, sec. 190.4, subd. (e)) will likely be valued well below $85,000. (See also, Guideline 4 [Case Evaluation], *infra*.)

Category II: $130,000.

A. An appeal from a judgment on remand following a reversal limited to the special circumstance finding(s) and penalty; or

B. An appeal otherwise in category I(A) or I(B) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: The combined record on appeal is 4,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants; or

C. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is under 6,000 pages.

Category III: $165,000.

A. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is between 6,000 and 12,000 pages; or

B. An appeal otherwise in category II(A) or II(C) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: The combined record on appeal is 5,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

Category IV: $195,000.

A. An initial appeal or an appeal from a judgment on remand following a reversal of guilt, in which the combined record on appeal is 12,000 or more pages; or

B. An appeal otherwise in category III(A) that presents a more complex case, in the Court's view, by reason of, but not limited to, one or more of the following factors: The combined record on appeal is 10,000 or more pages; there was more than one homicide victim, and the homicides occurred in more than one incident; there were numerous pretrial and/or penalty phase motions; there were multiple defendants and/or appellants.

Category V: $225,000 base fee.

Exceptional cases that occur infrequently, involve many victims and incidents, and have a combined record on appeal of 25,000 or more pages. In this category,

appointed counsel may present a justification at the outset for a fixed fee higher than the base fee.
(Adopted, eff. Jan 1, 1994. As amended, eff. Sept. 1, 1995.)

2. Incidental and Investigative Expenses

All incidental expenses for the direct appeal are included in the fixed fee. In addition to the agreed-upon fixed fee, counsel may also incur up to $12,000 in habeas corpus investigative expenses, without prior Court authorization, subject to the Court's Payment Guidelines, supra, part III, subpart C, paragraphs 1-7, inclusive ("Reimbursable expenses"). Counsel will be reimbursed for all such habeas corpus investigative expenses that were reasonably incurred, up to $12,000. The Court will not authorize or reimburse habeas corpus investigative expenses over $12,000, prior to the issuance of an order to show cause. (See also, Cal.Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, Timeliness Stds., std. 1-1 [as amended July 29, 1993].)
(Adopted, eff. Jan. 1, 1994. As amended, eff. Sept. 1, 1995.)

3. Requests for Additional Fees

In extraordinary and unique situations, the Court will entertain requests for additional fees based on exceptional circumstances (e.g., circumstances that were unforeseeable at the time of the appointment of counsel on a fixed fee basis). In such situations, counsel shall have the burden of proof to justify any additional fees.
(Adopted, eff. Jan. 1, 1994.)

4. Case Evaluation

There will be agreement on the fixed fee prior to the appointment of counsel. (See also, Guideline 6 [Conversion From Time and Costs Appointment to Fixed Fee], *infra*.) Initially, applicant counsel selected to

consider an appointment to a specific automatic appeal will have the option of investigating that case for purposes of proposing a fixed fee pursuant to these alternative guidelines, rather than the traditional time and costs method. At any given time, there will be only one set of applicant counsel investigating a specific automatic appeal for purposes of a possible appointment. Applicant counsel are encouraged to consult with trial counsel, examine any available transcript "dailies" prepared during the trial or other proceedings, and examine any available materials normally found in the clerk's transcript. Counsel are also encouraged to examine additional materials and information that may be available from the California Appellate Project in San Francisco. Using these alternative guidelines, applicant counsel opting to be appointed on a fixed fee basis will propose a category and hence a fee for all services and expenses in the case. The Court's concurrence is required for any such appointment.

Discussions with applicant counsel regarding proposals for fixed fee appointments shall be conducted through the Automatic Appeals Monitor.

The fixed fee encompasses counsel's investigative costs in reviewing the case for purposes of considering an appointment. If counsel's proposal for a fixed fee is not accepted by the Court, counsel will not be reimbursed for those investigative costs; however, counsel may request an appointment to that case pursuant to the traditional time and costs method of the Payment Guidelines.
(Adopted, eff. Jan. 1, 1994.)

5. Progress Payments

Until appointed counsel files the appellant's opening brief, a current status report must be filed every 60 days; thereafter, status reports regarding habeas corpus investigation are required every 60 days until a petition is

filed. Other than reimbursement for habeas corpus investigative expenses, documentation and itemization of hours and expenses by appointed counsel are not required under these alternative guidelines. Instead, counsel will be paid one-sixth of the fixed amount shortly after the actual appointment. Thereafter, counsel will receive progress payments after specified stages of the appellate representation: one-sixth after counsel's first request for correction of the record, one-sixth after certification of the record, one- sixth after counsel files the appellant's opening brief, one-sixth after counsel files a reply brief, and one-sixth after oral argument and submission of the matter on the direct appeal. Under limited circumstances (e.g., a delay in the certification of the record not due to a lack of diligence on the part of appointed counsel), the Court will authorize partial payments before completion of the relevant stage(s) of representation. However, the Court cautions all counsel that the order of appointment continues until the conclusion of: (1) counsel's duties and representation on the direct appeal, (2) counsel's responsibilities regarding state habeas corpus proceedings, including any state habeas corpus proceedings following a remand from federal court for purposes of exhaustion of state remedies, (3) any trial court proceedings under Penal Code sections 1193 and 1227 to set an execution date, and (4) any clemency petition to the Governor. (See Cal.Supreme Ct., Policies Regarding Cases Arising From Judgments of Death, Policy 2 [Withdrawal of Counsel], and Compensation Stds., std. 2-1.)
(Adopted, eff. Jan. 1, 1994.)

6. Conversion From Time and Costs Appointment to Fixed Fee

Counsel appointed to an automatic appeal under the traditional time and costs basis of the Payment Guidelines are encouraged to consider converting their method of compensation pursuant to this optional, fixed fee payment

system. Any such conversion must take into account any payments previously made to counsel, and must be approved by the Court. Ordinarily, conversion will not be approved after the filing of the appellant's opening brief. Counsel approved by the Court for an appointment to his/her first automatic appeal should carefully consider an initial appointment under the time and costs basis of the Payment Guidelines. A conversion to a fixed fee appointment pursuant to these alternative guidelines may be more appropriate after such counsel has become familiar with the case.
(Adopted, eff. Jan. 1, 1994.)

7. Second Counsel

The Court encourages association with second counsel. Unlike the procedure under the traditional time and costs appointment scheme of the Payment Guidelines, the fixed fees provided by this optional payment system are intended to adequately compensate appointed counsel and any associate counsel. Hence, the Court will not recognize a "second counsel override" in fixed fee cases.
(Adopted, eff. Jan. 1, 1994.)

8. Valuation and Length of Record on Appeal

In determining the length of the combined record on appeal as part of the process whereby a case may be valued within a fixed fee category, the Court will take into consideration whether an unusual proportion of the record is comprised of jury voir dire and/or preliminary hearing transcript. When appropriate, the Court may treat the combined record as having a reduced length.
(Adopted, eff. Jan. 1, 1994.)

9. Applicability of Supreme Court Policies Regarding Cases Arising From Judgments of Death

The Supreme Court Policies Regarding Cases Arising From Judgments of Death, as amended, apply to all

automatic appeals in which counsel has opted for a fixed fee pursuant to these alternative guidelines. However, the third sentence of standard 2-2 of the Compensation Standards, through standard 2-4.4 of the Compensation Standards (governing authorization to incur, and reimbursement of, habeas corpus investigation expenses), shall not apply to fixed fee cases.
(Adopted, eff. Jan. 1, 1994.)